PLUGGING LEAKS AND LOWERING LEVEES IN THE FEDERAL GOVERNMENT: PRACTICAL SOLUTIONS FOR SECURITIES TRADING BASED ON POLITICAL INTELLIGENCE†

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From its founding, the federal government of the United States has been a potential gold mine for nonpublic market-moving information. By selectively disclosing this information to securities traders outside the government (or to persons who advise them), federal officials can substantially privilege certain wealthy or otherwise well-connected investors over ordinary investors in the securities market. The trading profits that can be derived from the use of this material nonpublic government information are often tremendous.

This disparity of access to government information may be unfair. But absent an identifiable personal benefit on the part of the government insider, neither the selective disclosure of government information nor the securities trading by persons on the outside constitutes a violation of the federal securities laws—even under the newly enacted Stop Trading on Congressional Knowledge (STOCK) Act. Moreover, this "political intelligence" problem appears to be worsening: in recent months, news reports about federal officials' selective disclosure of nonpublic government information have proliferated,

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and the SEC and DOJ are currently investigating how these leaks may have occurred.

To address the problem of selective disclosure, this Article proposes practical solutions that focus on the source of the political intelligence problem: the federal government itself. Solving—or at least reducing the amount of—selective disclosure is a complex endeavor. Equal treatment of investors is an admirable goal, but in many situations, the government has legitimate interests in communicating with members of the public and disclosing information only to certain parties. Thus, this Article attempts to carve out a middle ground that neither unduly inhibits governmental functions nor allows for patently unequal treatment of investors.

TABLE OF CONTENTS

I. INTRODUCTION

Two years ago, news broke that the U.S. Securities and Exchange Commission ("SEC") had launched an investigation regarding a private meeting in July 2008 between then-U.S. Treasury Secretary Henry Paulson and about a dozen hedge fund and private equity firm managers.[1] According to the *Wall Street Journal*:

> SEC investigators are seeking information on whether Mr. Paulson suggested in the meeting that the government was willing to rescue the struggling mortgage-finance companies Fannie Mae and Freddie Mac . . . . The SEC is also looking at whether the firms traded on any information Mr. Paulson had shared . . . .[2]

The article reported that the SEC had sent subpoenas to the firms demanding information about specific trades made shortly after the meeting.[3]

This SEC investigation has so far not amounted to anything, and probably never will. No enforcement action is likely to be taken against anyone, even if Secretary Paulson did share material nonpublic information about the government's plans with the hedge fund and private equity firm managers (it is not clear what information he shared and

1. *See* Juliet Chung & Jean Eaglesham, *Trades After 2008 Meeting Probed*, WALL ST. J., Sept. 13, 2012, at http://online.wsj.com/news/articles/SB100087239630444433504577650082716565686.

2. *Id.* Bloomberg News broke the initial story about the meeting itself. *See* Richard Teitelbaum, *How Paulson Gave Hedge Funds Advance Word of Fannie Mae Rescue*, BLOOMBERG PERS. FIN. (Nov. 29, 2011, 11:46 AM), http://www.bloomberg.com/news/2011-11-29/how-henry-paulson-gave-hedge-funds-advance-word-of-2008-fannie-mae-rescue.html (reporting that at least five of the meeting's attendees were alumni of Goldman Sachs and that one hedge fund manager "was shocked that Paulson would furnish such specific information—to his mind, leaving little doubt that the Treasury Department would carry out the plan" to effectively wipe out the common and preferred stock of Fannie and Freddie).

3. Chung & Eaglesham, *supra* note 1 (stating that Taconic Capital Advisors confirmed that it had "received a subpoena related to the meeting" and reporting that the other meeting attendees included representatives of GSO Capital Partners, now part of Blackstone Group LP, Lone Pine Capital LLC, Och-Ziff Capital Management Group LLC, and TPG-Axon Management LP).

whether it was nonpublic), and even if the firms did trade Fannie Mae and Freddie Mac-related securities on the basis of that information. To be sure, information leaks of this sort can generate tremendous trading profits for securities investors who learn of market-moving information either directly or indirectly (through the use of so-called political intelligence consultants, who capitalize on their connections to the inside of government).[4] Securities trading based on such privileged access to material nonpublic government information undermines the public's confidence in the fairness and integrity of securities markets—and in the federal government itself. But the selective disclosure of market-moving government information, and securities trading on the basis of that information, is generally not illegal under federal securities law.

The stumbling block for the SEC's investigation of the Paulson meeting is that liability for illegal tipping generally turns on whether there has been a violation of Securities Exchange Act Section 10(b) and Rule 10b-5 thereunder, which broadly prohibit fraud "in connection with the purchase or sale" of a security.[5] And according to the Supreme Court's 1983 ruling in *Dirks v. SEC*,[6] the disclosure of material nonpublic information constitutes securities fraud only when a person breaches a fiduciary-like duty of trust and confidence by benefitting personally, directly or indirectly, from the disclosure.[7] In the Court's view, the requisite inquiry in a tipping case is a contextual one that focuses on "objective criteria," such as "pecuniary gain" on the part of the tipper, "a reputational benefit that will translate into future earnings," or "a gift of confidential information to a trading relative or friend."[8] Accordingly, it is not the mere breach of a duty of confidentiality or care that renders the communication of market-moving government information a fraudulent tip—it is a government insider's undisclosed self-serving use of that

4. *See* Brody Mullins & Susan Pulliam, *Buying 'Political Intelligence' Can Pay off Big for Wall Street*, WALL ST. J., Jan. 18, 2013, http://online.wsj.com/news/articles/SB10001424127887324660404578202072713156116 (reporting that "[t]he political-intelligence business has expanded rapidly over a decade as government decisions have come to play a growing role for some on Wall Street" and that "[i]nvestors spend more than $400 million a year for such intelligence"); *see also* Eamon Javers, *Washington Whispers to Wall Street*, BLOOMBERG BUSINESSWEEK (Dec. 25, 2005), http://www.businessweek.com/stories/2005-12-25/washington-whispers-to-wall-street; Jim Snyder, *K Street Phones Wall Street*, THE HILL (Feb. 15, 2005), https://archive.is/Ojje1. For an insightful student note, see Bud W. Jerke, Comment, *Cashing in on Capitol Hill: Insider Trading and the Use of Political Intelligence for Profit*, 158 U. PA. L. REV. 1451 (2010).

5. *See* 15 U.S.C. § 78j(b) (2012) (authorizing the SEC to promulgate rules prohibiting "manipulative or deceptive device[s] or contrivance[s]" in connection "with the purchase or sale of any security"); 17 C.F.R. § 240.10b-5(c) (2013) ("It shall be unlawful for any person . . . [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.").

6. 463 U.S. 646 (1983).

7. *Id.* at 661–62.

8. *Id.* at 663–64; *see also id.* ("The theory . . . is that the insider, by giving the information out selectively, is in effect selling the information to its recipient for cash, reciprocal information, or other things of value for himself . . . .") (quoting Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 348 (1979)).

information in breach of his or her duty of loyalty.[9] The recently enacted Stop Trading on Congressional Knowledge ("STOCK") Act amends the federal securities laws to specify that all federal officials (including members of Congress) owe "a duty arising from a relationship of trust and confidence to the United States Government and the citizens of the United States" and eliminates any doubt that personally benefiting from the use of nonpublic government information violates this duty.[10] But the STOCK Act does nothing to alter *Dirks*' holding that a personal benefit on the part of the tipper is essential for the disclosure of information to constitute securities fraud.[11]

The Supreme Court has also made clear that so-called tippee liability "is derivative from that of the insider's duty."[12] That is, a recipient of material nonpublic information assumes a fiduciary-like duty not to trade on that information only when the person disclosing it has breached a duty of trust and confidence "and the tippee knows or should know that there has been a breach."[13] Thus, absent the receipt of a personal benefit evidencing a federal official's disloyalty to the government,[14] privileged investors who receive selectively disclosed information are generally free to trade securities based on that information. Although it is not clear why Secretary Paulson had the meeting with the hedge fund and private equity firm managers or believed it important to reveal the information

9. The Court's decision in *Dirks* was rendered in a "classical" insider trading case involving a former officer of the corporation that issued the securities that were traded. By virtue of his relationship with the securities issuer, the former officer owed a duty of trust and confidence to the shareholders with whom the recipients of his disclosures were trading. Fourteen years later, the Court recognized an alternative "misappropriation" theory of insider trading, which extends securities fraud liability to "outsider" cases where material nonpublic information is used in breach of a duty of trust and confidence owed to the source of the information. United States v. O'Hagan, 521 U.S. 642, 652 (1997) ("In lieu of premising liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock, the misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information."). Government insider trading and tipping cases fall squarely within the misappropriation theory because while federal officials are "insiders" of the U.S. government, they are "outsiders" to the corporation that issued the securities that were traded. Although *O'Hagan* did not address directly the question of liability for tipping, it is now well settled that the personal benefit test developed in *Dirks* also "governs in a misappropriation case." SEC v. Obus, 693 F.3d 276, 285–86 (2d Cir. 2012).

10. STOCK Act, Pub. L. No. 112-105, § 9(b), 126 Stat. 291, 298 (2012) (codified at 15 U.S.C. § 78u-1(g)–(h)).

11. *Id.* Personal gain on the part of the federal official would likewise be necessary in order to prosecute tipping as a violation of federal anti-corruption statutes, including those prohibiting honest services fraud and the receipt of bribes or illegal gratuities. *See generally Peter J. Henning & Lee J. Radek, Prosecution and Defense of Public Corruption*: THE LAW AND LEGAL STRATEGIES 37–47, 107–121 (2011).

12. *Dirks*, 463 U.S. at 659; *see also id.* at 662 ("Absent some personal gain, there has been no breach of duty . . . . And absent a breach by the insider, there is no derivative breach.").

13. *Id.* at 660; *see also id.* at 659 (explaining that the "tippee's obligation has been viewed as arising from his role as a participant after the fact in the insider's breach of a fiduciary duty") (quoting Chiarella v. United States, 445 U.S. 222, 230 n.12 (1980)).

14. *See, e.g.*, United States v. Royer, 549 F.3d 886, 891, 898 (2d Cir. 2008) (affirming conviction of FBI agent and his tippee where agent was promised a share of the trading profits generated from the use of misappropriated confidential law enforcement information); *see also* Haas v. Henkel, 216 U.S. 462, 478 (1910) (affirming decision sustaining indictment charging defendants with a conspiracy to obtain crop reports from a Department of Agriculture statistician "in advance of general publicity and to use such information in speculating upon the cotton market").

about Fannie and Freddie, it is difficult to imagine that his motivation could satisfy the high hurdle of the personal benefit test established by *Dirks*. Indeed, we have no doubt that the vast majority of government officials who selectively share nonpublic information with persons on the outside do so for legitimate reasons consistent with their duty of loyalty to the federal government and its citizens. Information exchange is a two-way street and feedback or input from knowledgeable persons in the private sector can oftentimes be crucial to government decision-making.

Hedge funds or other privileged investors who receive selectively disclosed government information likewise cannot typically be charged with securities fraud under the misappropriation theory of insider trading. Liability under the misappropriation theory requires evidence that the person who traded on or tipped material nonpublic information stands in a fiduciary-like relationship of trust and confidence with its source.[15] When selectively disclosed government information is at issue, such evidence is rare, absent a principal/agent or some other special relationship between the securities trader and the government[16] Although an SEC rule imposes a duty of "trust or confidence" in situations where "a person agrees to maintain information in confidence"[17] or where persons have a "history, pattern, or practice of sharing confidences,"[18] for liability under the misappropriation theory to attach, there must also be a reasonable expectation on the part of the source that the entrusted information would not be used for securities trading purposes.[19] Returning again to the Paulson incident, it does not appear that anyone at the meeting had been instructed not to trade,[20] nor is it likely that the Secretary had a "history, pattern or practice" of sharing government secrets with the hedge fund and private equity firm managers who attended the meeting.

In a prior law review article, we gathered together press reports, administrative agency and congressional correspondence, and other materials revealing a litany of private meetings with legislative and executive branch officials that likely generated enormous trading profits for

15. United States v. O'Hagan, 521 U.S. 642, 652 (1997).

16. Government contractors, for example, typically sign agreements that prohibit the contractor and its affiliates from "[u]sing or releasing nonpublic information received under the contract except under limited conditions." Keith R. Szeliga, *Conflict and Intrigue in Government Contracts: A Guide to Identifying and Mitigating Organizational Conflicts of Interest*, 35 PUB. CONT. L.J. 639, 647 (2006).

17. 17 C.F.R. § 240.10b5-2(b)(1) (2013). *But see* SEC v. Cuban, 634 F. Supp. 2d 713, 728 (N.D. Tex. 2009) (holding that the defendant's alleged trading on information subject to a confidentiality agreement would not have been deceptive under Section 10(b) unless the SEC could also show that defendant "agreed, expressly or implicitly, to refrain from trading on or otherwise using for his own benefit the information the CEO was about to share"), *vacated and remanded on other grounds*, 620 F.3d 551 (5th Cir. 2010).

18. 17 C.F.R. § 240.10b5-2(b)(2).

19. *See O'Hagan*, 521 U.S. at 643, 652 (framing the misappropriation theory as "a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities" and stating that "the deception essential to the theory involves feigning fidelity to the information's source").

20. *See* Teitelbaum, *supra* note 2 (positing that those attending the meeting were "given a choice opportunity to trade on that information").

the privileged attendees or their clients.[21] Some of the selective disclosures apparently made at these meetings concerned regulators' stances toward industries or individual companies, such as communications between hedge fund executives and the Department of Education about regulation of for-profit colleges[22] or between institutional investors and the Department of Defense about cost-cutting plans.[23] Many other disclosures were made in the course of private briefings arranged by political intelligence consultants, who brought hedge fund and private equity firm managers together with members of Congress or their legislative aides.[24] These managers constitute "a select group who pay[s] for early, firsthand reports on Capitol Hill," which is becoming "a growing, lucrative—and legal—practice . . . ."[25] But the federal government's problem with selective disclosure dates back more than two hundred years: in 1789, speculators learned from sources in the Treasury Department and Congress about then-Treasury Secretary Alexander Hamilton's successful push for a federal bailout of the states from their Revolutionary War debt.[26] From at least that time forward to the present, federal government insiders have adhered to a long tradition of leaking material nonpublic information to well-connected outsiders who then used that information in connection with securities trading or advising.[27]

21. Donna M. Nagy & Richard W. Painter, *Selective Disclosure by Federal Officials and the Case for an FGD (Fairer Government Disclosure) Regime*, 2012 WIS. L. REV. 1285, 1301–08.

22. Ben Protess, *Grassley Questions Education Agency's Ties to Hedge Funds*, N.Y. TIMES, July 28, 2011, http://dealbook.nytimes.com/2011/07/28/grassley-questions-education-agencys-ties-to-wall-street/.

23. Joe Nocera, *From Pentagon, a Buy Rating on Contractors*, N.Y. TIMES, Feb. 11, 2011, http://www.nytimes.com/2011/02/12/business/12nocera.html?pagewanted=all (sharply critiquing what was claimed to be the growing practice of officials at the Pentagon "sidling up to" institutional investors and securities analysts specializing in the military industry).

24. Brody Mullins & Susan Pulliam, *Inside Capitol, Investor Access Yields Rich Tips*, WALL ST. J., Dec. 20, 2011, http://online.wsj.com/news/articles/SB1000142405297020484450457710260349084878.

25. *Id.*

26. *See* Nagy & Painter, *supra* note 21, at 1297 (discussing this incident as recounted in the journal of William Maclay, a Senator representing Pennsylvania in the First Congress).

27. We use the broad term "leak" to describe the intentional sharing of material nonpublic information with a favored person or group of persons. Many legal scholars, however, have focused specifically on leaks to the press, with most of those leaks involving classified or confidential national security information. *See, e.g.*, GARY ROSS, WHO WATCHES THE WATCHMEN? THE CONFLICT BETWEEN NATIONAL SECURITY AND FREEDOM OF THE PRESS (2011); GEOFFREY R. STONE, TOP SECRET: WHEN OUR GOVERNMENT KEEPS US IN THE DARK (2007); Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233 (2008); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013). Professor Pozen further distinguishes between unauthorized leaks and "plants," which involve explicitly authorized disclosures designed to advance governmental interests. *Id.* at 534. What lies between leaks and plants he categorizes as "pleaks," a term that encompasses quasi-authorized disclosures through which "senior [government] officials pursue rival policy goals." *Id.* at 568. He thus points out that while "[t]he heads of executive branch agencies and their immediate advisers and assistant secretaries are widely thought to be inveterate leakers[,]" they can "be better understood as a community of pleakers." *Id.* at 569. We find Professor Pozen's deconstruction of national security leaks enormously helpful, and we would venture to say that our examples of selectively disclosed market-moving information may well involve more "pleaking" than leaking (with some planting as well).

Our earlier article had several objectives beyond demonstrating the ubiquity of selective disclosure in the federal government. As encapsulated in the above discussion of the Paulson incident, we also analyzed insider trading law to show why most instances of selective disclosure by federal officials fail to constitute illegal tipping, and we analogized this troubling problem to a past practice in the private sector. In the 1980s and 1990s, corporate executives at publicly traded companies routinely provided securities analysts and professional investors with material nonpublic information pertaining to corporate earnings and other market-moving developments.

Regulation Fair Disclosure ("FD"),[28] which the SEC adopted in 2000, put an end to that unfair informational advantage by instituting an "all or nothing" rule: publicly traded companies are not required to make any additional disclosures, "but if they tell someone, they must tell everyone."[29] Regulation FD, however, leveled the playing field for all investors only after SEC officials looked beyond the construct of fraudulent tipping and trading. The SEC's pre-FD struggle with selective disclosure in the private sector informed our critique of legislative proposals seeking to curtail securities trading on the basis of nonpublic government information. One of these proposals would have prohibited such trading outright,[30] and the other (still under consideration in Congress) would require political intelligence consultants to register under the Lobbying Disclosure Act before seeking to acquire information from federal officials.[31] We concluded that each proposal placed unjustifiable burdens on the private sector and that neither tackled the problem of selective disclosure at its root, which is the federal government's own lack of effective internal controls regarding its dissemination of so-called political intelligence.[32]

The final part of our prior article urged the adoption of a new regime for Fairer Government Disclosure ("FGD"). We acknowledged that there was additional study and work to be done as to how an FGD regime could best be implemented and enforced. But we proposed a se-

28. 17 C.F.R. § 243.100 (2013).

29. Robert B. Thompson & Ronald King, *Credibility and Information in Securities Markets After Regulation FD*, 79 WASH. U. L.Q. 615, 615 (2001).

30. *See* H.R. 1148, 112th Cong. (2011); *see also* Nagy & Painter, *supra* note 21, at 1334 (observing that H.R. 1148 "garnered a remarkable 285 cosponsors in the House in the aftermath of a *60 Minutes* segment" shedding light on securities trading based on nonpublic government information).

31. Nagy & Painter, *supra* note 21, at 1330–34 (discussing legislative efforts "to require registration of 'political intelligence firm[s]' and public reporting of 'political intelligence activities'").

32. As an alternative to regulating the gathering of political intelligence, the STOCK Act instructed the Comptroller General, in consultation with the Congressional Research Service, to study and report to Congress within a year on the "role of political intelligence in the financial markets." That study, perhaps not surprisingly, left its central question unanswered. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-389, POLITICAL INTELLIGENCE: FINANCIAL MARKET VALUE OF GOVERNMENT INFORMATION HINGES ON MATERIALITY AND TIMING (2013), http://www.gao.gov/assets/660/653532.pdf [hereinafter GAO POLITICAL INTELLIGENCE STUDY] (concluding that "[t]he prevalence of the sale of political intelligence is not known and therefore difficult to quantify" and that the "extent to which investment decisions are based on a single piece of political intelligence would be extremely difficult to measure").

ries of interim measures that could be taken by federal officials, either individually or through directives from agency heads or congressional committees. Among other steps, we suggested that federal officials make greater use of confidentiality agreements with nonuse components. We also recommended greater use of the internet and encouraged more postings by agencies and congressional offices, more webcasts, and overall more transparency. Our bottom line was that any new regime for the federal government, like Regulation FD for publicly traded companies, should focus on regulating "insiders and what they do . . . rather than on policing information *per se* and its possession . . . ."[33]

In the months since the publication of our prior article, news reports about other incidents of selective disclosure by federal officials have proliferated. At the start of 2013, the *Wall Street Journal* was the first to report that the SEC had issued subpoenas to the Marwood Group, a political intelligence firm founded by Edward Kennedy Jr., that sought inforinformation as to how the firm "was able to warn its Wall Street clients that regulators [from the Food and Drug Administration] might delay approving a promising drug in the fall of 2010."[34] Several months later, front-page newspaper headlines revealed inquiries by the SEC and the Department of Justice ("DOJ") into the leak of a federal funding decision pertaining to health care reimbursements—a leak which apparently sparked a trading surge in the stock of Humana, Aetna, and other major health companies.[35] Initial speculation focused on particular Senate staffers whose emails and telephone records reflected conversations with political intelligence consultants who had been retained by brokerage firms.[36] But several weeks later, the *Washington Post* reported that at least 436 employees at the Department of Health and Human Services "had early access to the Medicare decision as much as two weeks before it was made public."[37] Around that same time, an altogether different

33. Dirks v. SEC, 463 U.S. 646, 663 (1983) (quoting Investors Mgmt. Co., 44 S.E.C. 633, 648 (1971)). We were hardly the first commentators to point out the disparities between the treatment of selective disclosure in the private and public sectors. Professor Larry Ribstein did so years before us. *See* Larry Ribstein, *Congressmen as Securities Traders*, TRUTH ON THE MARKET (Mar. 13, 2011), http://truthonthemarket.com/2011/03/13/congressmen-as-securities-traders/ ("[Congress can protect] against corruption by mandating disclosure not only of trades but also tips. In other words, as little as I like Regulation FD, there might be some benefit to imposing something like it on Congress.").

34. Mullins & Pulliam, *supra* note 4.

35. Jerry Markon & Jia Lynn Yang, *Intel for Investors: What's Going on Behind Closed Doors in Washington*, WASH. POST, May 2, 2013, http://www.washingtonpost.com/politics/political-intelligence-industry-in-washington-under-scrutiny-amid-federal-inquiry/2013/05/02/e284e08e-b364-11e2-9a98-4be 1688d7d84_story.html; Jia Lynn Yang et al., *How 'Political Intelligence' Can Come from Congress Itself*, WASH. POST, May 6, 2013, http://www.washingtonpost.com/business/economy/how-political-intelli gence-can-come-from-congress-itself/2013/05/06/a2998e4c-b68a-11e2-b94c-b684dda07add_story.html; *see also* Brody Mullins & Tom McGinty, *SEC Broadens Its Probe of "Political Intelligence"*, WALL ST. J., May 4, 2013, http://online.wsj.com/news/articles/SB10000142412788732458200487846149226738 3464.

36. *See* Yang et al., *supra* note 35.

37. Tom Hamburger & Dina ElBoghdady, *Hundreds in Government Had Advance Word of Medicare Action at Heart of Trading Spike Prove*, WASH. POST, June 9, 2013, http://www.washington post.com/politics/hundreds-in-government-had-advance-word-of-medicare-action-at-heart-of-trading-spike-probe/2013/06/09/044944d0-cec7-11e2-8845-d970ccb04497_print.html.

spotlight was directed at political intelligence briefings apparently occurring at the White House.[38] At the center of that controversy were private conversations between Wall Street investors and "Obama administration officials, including a top White House adviser helping to implement the Affordable Care Act."[39]

This Article builds on our prior work by proposing practical solutions to the problem (both real and perceived) of securities trading based on political intelligence. In stark contrast to the reporting-and-registration remedy that places the burden on private sector persons who gather and use political intelligence, we direct our attention to the source of the problem: the federal government itself. While we begin with the premise that federal officials should disseminate market-moving government information to the general public as soon as possible, we also recognize that government information often must remain nonpublic for a period of time. We thus suggest a variety of ways to plug up the leaks, which would prevent material nonpublic government information from falling into the hands of persons who are likely to use it for trading in securities markets. We also emphasize that the process for lowering levees can be crucial because some procedures for the public dissemination of market-moving information provide broader and more equal access than others. In all of these situations, however, equal treatment of investors has to be weighed against other government objectives, including effective interaction by federal agencies and by Congress with regulated industry, public interest groups, and other constituencies outside the government.

Our analysis is centered on fairer disclosure by the federal government. We do not make specific proposals for states and localities because these governments differ widely in organizational structure and function. But we do discuss unique problems likely to arise in the state and local setting, including the fact that many officials work for the government part time and interact with private clients, investors, and other commercial interests in their nongovernment employment. We also briefly explore what may be a frequent temptation on the part of public universities to fund academic research through the selective disclosure of market-moving information to third-parties who, in turn, sell that infor-

38. *See* Tom Hamburger, *Political Intelligence Firms Set up Investor Meetings at the White House*, WASH. POST, May 26, 2014, http://www.washingtonpost.com/politics/political-intelligence-firms-set-up-investor-meetings-at-white-house/2013/05/26/73b06528-bccb-11e2-9b09-1638acc3942e_story.html; Tom Hamburger, *Investor Access, at the Top Level*, WASH. POST, May 27, 2013, http://www.washingtonpost.com/politics-intelligence-firms-set-up-investor-meetings-9boq-163acc392c-story.html.

39. *Id.* (reporting that these conversations and a separate fifty minute conference call involving an official at the Center for Medicare and Medicaid Services and managers of hedge funds, pension plans, and mutual funds, were arranged by political intelligence firms). The journalist emphasized, however, that "[t]here is no evidence that the private discussions with the two administration officials about health-care decisions provided investors with confidential agency information or that the investors made trades based on what they learned." *Id.*

mation to securities traders.[40] Moreover, with the growth of global securities markets, selective disclosure of information by governments is a global problem.[41] While solutions to this problem will differ from country to country, and while many countries may not even attempt to solve the problem, countries that care about selective disclosure of government information will need to coordinate their efforts for some of their controls to be effective.

Part II discusses existing statutes and regulations, as well as a sampling of specific agency policies, relating to the disclosure of government information. Although some of these provisions and practices are designed to insure the public's access to government information (subject to certain exceptions), lucrative profits can often be made from securities trading on the basis of that information. Information, for example, could be released under the Freedom of Information Act ("FOIA") to persons who specifically requested it, yet that information would not be "public" under a definition of the term that turns on whether it has been "effectively disclosed in a manner sufficient to insure its availability to the investing public."[42] Part II also discusses the much larger body of statutes, regulations, and agency policies that are designed to protect confidential information from unauthorized disclosure by government officials. Some of these measures are aimed at potential use of the information in securities markets, but most are directed at other abuses, such as threats to national security or law enforcement, invasions of privacy, or unauthorized disclosures of information entrusted to a government agency. Notwithstanding provisions of this sort, selective disclosures often occur because much nonpublic information may not be designated as "confidential," and even when confidential information is at issue, agency heads and senior officials have enormous discretion over the circumstances under which authorized disclosure can be made.[43] Moreover, most of these provisions do not extend to congressional officials and employees, and confidentiality obligations applicable to Congress are ill-defined outside of specific contexts such as national security.

Part III discusses countervailing considerations that must be given substantial weight in the crafting of any new statutes, regulations, and policies designed to achieve fairer government disclosure. These include possible constitutional constraints on provisions that treat certain catego-

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40. *See infra* notes 212–16 and accompanying text (discussing Thomson-Reuters's annual payments to the University of Michigan for the exclusive right to disseminate and publish consumer-confidence research data).

41. *See* Jayanth Varma, *Selective Price Sensitive Disclosure by Government Functionaries*, PROF. JAYANTH R. VARMA'S FIN. MKTS. BLOG (Oct. 26, 2012, 7:03 PM), http://jrvarma.wordpress.com/2012/10/26/selective-price-sensitive-disclosure-by-government-functionaries/ (hyperlinking memorandum from the Chairman of the UK Statistics Authority to UK Prime Minister David Cameron questioning an incident of prerelease access to official statistics). The author observed that "[i]n India also we have seen selective (and even misleading) disclosure of information by government functionaries" and that "[t]here is a need to develop mechanisms to reduce the chance of such events." *Id.*

42. SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 854 (2d Cir. 1968) (en banc).

43. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 294 (1979).

ries of outsiders, such as hedge fund and private equity firms, differently with respect to their access to government information. There are also constitutional and policy considerations to take into account with leak-plugging approaches that impede the rights of citizens to engage in conversations with federal officials about policy concerns and grievances against the government. Another countervailing concern is whether curtailment of selective disclosure could interfere with scrutiny of government by outside persons and organizations who gather information, whether through FOIA requests or otherwise. An additional consideration is whether a policy against selective disclosure might interfere with the ability of federal officials to learn valuable information and receive useful policy input and analysis from their interaction with important constituencies.

Part IV constructs several alternative approaches to fairer government disclosure and considers how these alternatives can be implemented and enforced. We recognize, however, that the problem of selective disclosure is as complex as it is serious. If Congress and the executive branch go overboard in their control of information leaks, they could sacrifice important elements of effective and open government and could unconstitutionally infringe on the rights of citizens. On the other hand, if Congress and the executive branch ignore the selective disclosure problem, their passivity allows federal officials to favor and enrich some investors at the expense of others. As with many other complex public policy problems, doing too much is not a good choice, but failing to act is just as bad. There is a middle path, and this Article begins a conversation about how to blaze it.

II. Existing Laws, Regulations, and Policies Relating to the Disclosure of Government Information

A. Provisions and Practices Designed to Facilitate Public Access to Government Information

1. The Freedom of Information Act

The Freedom of Information Act[44] is premised upon a transparency principle and requires government agencies to disclose certain information upon request.[45] FOIA, however, is a request-based regime, meaning that unless otherwise required to be made public,[46] the information is only disclosed upon request to the particular person who re-

44. 5 U.S.C. § 552 (2012).

45. *Id.*

46. FOIA's general public reporting requirements are set forth in 5 U.S.C. §§ 552(a)(1) and (2). These provisions require each agency to publish certain statements and rules in the Federal Register, and mandate public availability for the inspection and copying of a host of other materials including final opinions and orders, interpretative statements, and staff manuals/instructions that affect members of the public.

quests it.[47] If the requestor is a news organization, some, but probably not all, of the information is likely to be publicly disclosed in a news story, assuming there is one. If the requestor is a private person or entity, however, the information may not become public for a long time, if ever. FOIA does not mandate public disclosure—on an agency website, press release or otherwise—of information that has been disclosed in response to a FOIA request.[48]

FOIA, and agency policies for answering FOIA requests, thus do not necessarily mean that market-moving information subject to valid FOIA requests is disclosed to investors generally or incorporated into securities prices. Information could be made available to a requestor yet not "effectively disclosed in a manner sufficient to insure its availability to the investing public."[49] Requestors under FOIA are not prohibited from using the information for trading in securities markets, and are not prohibited from passing the information along to persons who will do the same. Nor should they be. While FOIA requestors may possess an informational advantage in securities markets, that advantage is not "unerodable"—any person with the wherewithal to make a request can obtain that same advantage.[50]

Furthermore, certain information is exempt from disclosure under FOIA—and in fact should not be disclosed—in response to a request. Several categories of information are exempt, including trade secret information that a third party has entrusted to a federal agency, information about supervision and examination of financial institutions, law enforcement information, and agency personnel information.[51] FOIA recognizes that in these areas, either the government itself or a third party has an interest in keeping information confidential.

2. *Other Federal Statutes Aimed at Transparency and Accountability*

In addition to FOIA, a host of other federal statutes have governmental transparency and accountability as key objectives. For example, federal agencies are required to disclose some information about their internal rulemaking process, including comment letters they receive, pursuant to the Administrative Procedure Act.[52] Some agency meetings must be open to the public pursuant to the Government in the Sunshine

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47. 5 U.S.C. § 552(a)(3).

48. Agencies are, however, required to make available for public inspection and copying all records that have been released to requestors if the agency determines that, because of the nature of their subject matter, the records "have become or are likely to become the subject of subsequent requests for substantially the same records." 5 U.S.C. § 552(a)(2)(D).

49. SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 854 (2d Cir. 1968) (en banc).

50. *See* United States v. O'Hagan, 521 U.S. 642, 658–59 (1997) (citing Professor Victor Brudney and emphasizing that while "informational disparity is inevitable in the securities markets," investors lose confidence in markets and "hesitate to venture their capital" when an informational "disadvantage . . . cannot be overcome with research or skill").

51. 5 U.S.C. § 552(b)(4).

52. Administrative Procedure Act, Pub. L. No. 79-404, §10(e), 60 Stat. 237, 243–44 (1946) (codified as amended at 5 U.S.C. §706).

Act.[53] And many federal agencies are required to provide periodic reports to Congress, most of which are made available to the public, although there may be a delay.[54]

There is, however, no general transparency regime mandating public disclosure for departments and agencies in the federal government. Yet Congress imposes onerous financial transparency and certain other disclosure requirements on thousands of private sector companies.[55] Pursuant to the Securities Exchange Act of 1934, more than 14,000 "publicly traded" companies file with the SEC annual (10-K) and quarterly (10-Q) reports as well as special reports about particular categories of significant developments during intervals between periodic reports (8-K).[56] All of these reports are easily accessible to the public on the SEC's website.[57] The absence of an analogous reporting regime for the federal government means that a lot of government information is not disclosed publicly—even if it is publicly available in the sense that members of the public have the ability to obtain access to it. Well informed securities markets are not the object of these open government laws, and only sometimes do these laws lead federal agencies to provide investors in general with the publicly available information that investors would consider material.

3. Recent Open-Government Initiatives in the Executive Branch

On his first day in office, President Obama ordered the Office of Management and Budget ("OMB") to issue an open government directive requiring federal agencies to take specific steps toward greater transparency, participation, and collaboration.[58] But neither that OMB directive, nor any of the open-government initiatives that followed in its aftermath, were tailored specifically toward preventing the type of in-

53. 5 U.S.C. § 552b.

54. The Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285, accounts for much of this reporting. Indeed, there are so many such reports that Congress phased some of them out in the Federal Reports Elimination and Sunset Act of 1995, but many of these were restored in separate legislation in the late 1990s. *See* H.R. REP. NO. 104-327 (1995). Further modifications to agency reporting requirements were made under the GPRA Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866.

55. Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1340–41 (1996) ("More than any other nation, we have cast a broad vote of confidence in the integrity and efficiency of the markets, and in the transparency not just of the markets but of the underlying companies.").

56. *Researching Public Companies Through EDGAR: A Guide for Investors*, U.S. SEC. & EXCH. COMM'N, *available at* https://www.sec.gov/investor/pubs/edgarguide.htm#P242_26995 (last visited July 17, 2014).

57. The SEC's Electronic Data Gathering, Analysis and Retrieval system (EDGAR) is a searchable database that "performs automated collection, validation, indexing, acceptance, and forwarding of submissions by companies and others who are required by law to file forms with the U.S. Securities and Exchange Commission (SEC)." *Important Information About EDGAR*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/edgar/aboutedgar.htm (last visited July 17, 2014). As the SEC explains, EDGAR's "primary purpose is to increase the efficiency and fairness of the securities market for the benefit of investors, corporations, and the economy by accelerating the receipt, acceptance, dissemination, and analysis of time-sensitive corporate information filed with the agency." *Id.*

58. *See* Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009).

formational edge that privileged investors routinely attain from their connections to the inside of government.[59] Instead, the initiatives were generally directed at making government data more accessible.

An important step toward this goal of accessibility occurred in May 2013, when the President issued an executive order that makes "open and machine readable" the new default rule for the release of government information.[60] The Executive Order did not mention equitable investor access to information as a rationale for the initiative, but it did say that open access to information was important "[t]o promote continued job growth, Government efficiency, and the social good that can be gained from opening Government data to the public . . . ."[61] The OMB simultaneously sent a memorandum to agency heads providing specific guidelines for implementation of the Executive Order, and instructed all executive branch departments and independent agencies to develop new procedures and protocols to more effectively manage "information as an asset" throughout its life cycle.[62] The memorandum emphasized at the outset that "[i]nformation is a valuable national resource and a strategic asset to the Federal Government, its partners, and the public."[63]

B. Generally Applicable Provisions that Protect Confidential Government Information

Needless to say, not all government information is even supposed to be publicly available. National security and other classified information is protected under an elaborate regulatory scheme that subjects leakers to criminal liability.[64] Nonclassified confidential information is subject to protection under omnibus statutes such as the Trade Secrets Act and the Privacy Act, but many of these statutes do not apply to congressional officials or employees.[65] Officials and employees in the executive branch

59. *See generally Open Government Initiative*, WHITEHOUSE.GOV, Http://www.whitehouse.gov/open (last visited July 17, 2014).

60. *See* Exec. Order No. 13,642, 78 Fed. Reg. 28,111 (May 9, 2013). The Executive Order instructed the Director of the Office of Management and Budget (OMB) to consult with the Chief Information Officer, Chief Technology Officer, and the Administrator of the Office of Information and Regulatory Affairs (OIRA), and to issue an "Open Data Policy to advance the management of Government information as an asset . . . ." *Id.* The Executive Order also made clear that "[w]hen implementing the Open Data Policy, agencies shall incorporate a full analysis of privacy, confidentiality, and security risks into each stage of the information lifecycle to identify information that should not be released." *Id.*

61. *Id.*

62. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-13.pdf. The OMB memorandum requires "agencies to collect or create information in a way that supports downstream information processing and dissemination activities" and further states that "[t]his includes using machine readable and open formats, data standards, and common core and extensible metadata for all new information creation and collection efforts." *Id.* at 1–2. The Memorandum also requires agencies to review information "for privacy, confidentiality, security, or other restrictions to release." *Id.* at 2.

63. *Id.*

64. JENNIFER K. ELSEA, CONG. RESEARCH SERV., RS21900, THE PROTECTION OF CLASSIFIED INFORMATION: THE LEGAL FRAMEWORK 10 (2013).

65. *See, e.g.*, 18 U.S.C. § 1905 (2012).

must also comply with regulations promulgated by the Office of Government Ethics as well as the regulations issued by the particular agency they serve. And Congress operates under its own set of provisions which are, in general, much less stringent than the provisions applicable to the other two branches.

1. *National Security and Other Classified Information*

The government protects information that is important to national security through a formal process for classifying the information in various categories: "confidential," "secret," "top secret," and "sensitive compartmentalized information" ("SCI").[66] The Information Security Oversight Office ("ISOO"), a unit of the National Archives, monitors the process for classifying, declassifying, and handling classified information. Criminal statutes prohibit unauthorized disclosure of classified information[67] as well as disclosure of other information vital to the national defense.[68] Although the government is usually successful in protecting classified information, the Wikileaks scandal in 2011[69] as well as Edward Snowden's 2013 disclosures about classified electronic eavesdropping operations[70] show the vulnerability of even the most concerted efforts to prevent disclosure of government information.

2. *Omnibus Statutes Protecting Nonclassified Confidential Information*

The Trade Secrets Act,[71] entitled "Disclosure of Confidential Information Generally," is the broadest statutory bar on unauthorized disclosure of confidential information. It provides that:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, . . . publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties . . . which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by

66. DEP'T OF HOMELAND SECURITY, SENSITIVE COMPARTMENTED INFORMATION PROGRAM MANAGEMENT 3 (2004).
67. *See* 18 U.S.C. § 798 (providing criminal penalties for the disclosure of classified information).
68. *See, e.g.*, 18 U.S.C. § 793–94 (covering the gathering, transmitting, losing, or delivering of defense information).
69. *See Hearing on the Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks Before the H. Comm. on the Judiciary*, 111th Cong. (2010).
70. Mark Hosenball, *NSA Chief: Snowden Leaked up to 200,000 Secret Documents*, REUTERS (Nov. 14, 2013), http://www.reuters.com/article/2013/11/14/us-usa-security-nsa-idUSBRE9AD19B20131114.
71. 18 U.S.C. § 1905.

law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.[72]

Although originally intended to protect trade secrets from unauthorized disclosure by federal IRS agents,[73] this provision of the Trade Secrets Act covers a broad range of other unauthorized disclosures of agency information. The Act has, for example, been held to apply to an SEC official who allegedly disclosed information about a securities investigation to assist a friend with a civil lawsuit against a third party,[74] and to a Customs Service employee who disclosed information from a law enforcement database to a friend who was under investigation.[75] The Act has been challenged for apparent vagueness, but courts have rejected this claim, pointing out that the Act covers disclosure only of information that is designated as "confidential" pursuant to agency policy or regulations.[76] The term confidential has been interpreted to require "*at least* that the government agency in question have an official policy that the information *not* be disclosed (or that nondisclosure be mandated by statute or regulation)."[77]

Several agencies, including the Department of Defense,[78] the IRS,[79] the OMB,[80] and the Department of Veterans Affairs[81] have warnings

72. *Id.*

73. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 296–97 (1979) ("Congress was primarily concerned with unauthorized disclosure of business information by feckless or corrupt revenue agents, for in the early days of the Bureau of Internal Revenue, it was the field agents who had substantial contact with confidential financial information." (footnote omitted)).

74. *See* Hunter v. Heffernan, No. CIV. A. 94–5340, 1996 WL 694237, at *1–2 (E.D. Pa. Sept. 26 1996) (citing the Trade Secrets Act and concluding that the Act "expressly prohibited" the defendant from "disclosing confidential financial information [he had] obtained in a securities fraud investigation of plaintiff to his former girlfriend . . . and to her attorney for their use in pursuing a civil claim against plaintiff").

75. *See* United States v. Wallington, 889 F.2d 573, 580 (5th Cir.1989) (upholding criminal conviction of Customs Service employee who used a confidential law enforcement database to check federal and state records of several individuals, at the request of a friend who, believing she was under investigation in connection with the murder of her husband, wanted the confidential information to assist her attorney with her defense).

76. *Id.* at 577 (emphasizing the statutory heading "Disclosure of Confidential Information Generally" and other evidence that Congress only intended to prohibit disclosures of confidential information).

77. *Id.* at 579. *Wallington* held "that section 1905 prohibits the disclosure of information by a federal employee only if the information is confidential, *at least* in the sense that it is the official policy of the agency in question (or is otherwise required by statute or regulation) that the information *not* be released." *Id.* at 577.

78. *See* U.S Department of Defense, Standards of Conduct Office, Non-Senior Employee Post-Government, Employment Restrictions (January 2014), *available at* http://www.dod.mil/dodgc/defense_ethics/resource_library/pgser_nonsenior.pdf ("Even though you have left Government service, you still may not use nonpublic information to further your own private interests, or those of another, including your subsequent employer. Nonpublic information includes classified information, source selection data, information protected by the Privacy Act, proprietary information, information protected by the Trade Secrets Act, and other information that has not been made available to the public and is exempt from disclosure.").

79. *See* Memorandum from Charles B. Christopher, Chief counsel I.R.S., to Lorraine M. Thompson, Senior Tax Analyst, (Oct. 23, 2006), *available at* http://www.irs.gov/pub/lanoa/pmta00821_7295.pdf (referencing the Trade Secrets Act).

80. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR CHIEF ACQUISITIONS OFFICERS, SENIOR PROCUREMENT EXECUTIVES, CHIEF INFORMATION OFFICERS 10 (2012), http://www.gsa.gov/graphics/staffoffices/OFPP_Myth-Busting2.pdf ("In many

about compliance with the Act in their employee handbooks and memoranda. The Office of Legal Counsel of the DOJ, however, has concluded that the Act does not apply to official capacity communications between officials at different federal agencies.[82] Agencies that exchange information sometimes enter into a memorandum of understanding to protect information and assure compliance with the Act.[83] Moreover, the Act's prohibition does not apply to disclosure of information generally available to the public.[84]

Although the Trade Secrets Act prohibition is broad, it does not cover many instances of selective disclosure because much government information is not confidential pursuant to agency policy, regulations, or statutes. This information may not be publicly disseminated at the time it is selectively disclosed by an agency employee, but it is still not confidential within the meaning of the Act. Moreover, agency heads and other senior agency officials have enormous discretion over whether information is in fact categorized as "confidential" and the circumstances under which exceptions can be made.[85] Thus, the revelation of nonpublic information by agency heads and other senior agency officials often cannot be deemed "unauthorized by law" within the meaning of the Trade Secrets Act.[86]

The 1974 Privacy Act also protects information from disclosure by government agencies in order to prevent potential harm to private parties.[87] The OMB has responsibility for administering the Act.[88] The Act's

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cases, the Trade Secrets Act will prohibit Federal employees from divulging protected information, including confidential commercial or financial data, trade secrets, operations, processes, or style of work. Also, the Freedom of Information Act (FOIA) allows agencies to protect commercial or financial information that is privileged or confidential.").

81. *See* DEP'T OF VETERANS AFFAIRS, PROCEDURES FOR IMPLEMENTING THE FREEDOM OF INFORMATION ACT 10 (1998), *available at* http://www1.va.gov/vapubs/viewPublication.asp?Pub_ID=22&FType=2 (noting that "trade secrets and other confidential business information furnished to VA from outside the Government" may be withheld from responses to FOIA requests).

82. *See* DEP'T OF JUSTICE OFFICE OF LEGAL COUNSEL, MEMORANDUM FOR THE GENERAL COUNSEL OFFICE OF FEDERAL HOUSING ENTERPRISE OVERSIGHT (1999), *available at* http://www.justice.gov/sites/default/files/olc/opinions/1999/04/31/op-olc-v023-p0074.pdf ("[W]e conclude that the type of inter-agency, official purpose disclosures set forth in your letter would be 'authorized by law' within the meaning of the Trade Secrets Act and therefore would not violate that act.").

83. *See* DEP'T OF HEALTH AND HUMAN SERVS., MEMORANDUM OF UNDERSTANDING BETWEEN THE FOOD AND DRUG ADMINISTRATION AND THE CENTERS FOR DISEASE CONTROL AND PREVENTION 3 (2000), *available at* http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/ucm212905.htm ("Both agencies recognize and acknowledge, however, that it is essential that any confidential information that is shared between FDA and CDC must be protected from unauthorized public disclosure.").

84. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002 (1984) ("Information that is public knowledge or that is generally known in an industry cannot be a trade secret.").

85. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 294 (1979) ("We therefore conclude that Congress did not limit an agency's discretion to disclose information when it enacted the FOIA.").

86. *But see id.* at 298–301 (rejecting the argument that the Act is "essentially an 'anti-leak' statute that does not bind the heads of governmental departments or agencies" and emphasizing that "the appropriate inquiry is whether [agency] regulations provide the 'authoriz[ation] by law' required by the statute").

87. *See* Privacy Act of 1974, 5 U.S.C § 552a (2012).

88. *Id.* § 552a(v).

chief purpose is to protect personal privacy[89] and requires agencies to allow individuals increased control over the gathering, dissemination, and accuracy of information about them.[90] Generally, the Act prohibits federal agencies from disclosing any "record" to "any person, or to another agency . . . ."[91] The Act defines "record" as any (a) "item, collection, or grouping of information about an individual" that is (b) "maintained by an agency" and (c) contains that individual's identifying information.[92] The Act lists several items that fall within the ambit of identifying information, including: an individual's "name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph[.]"[93] The Act also identifies five classes of "records" Congress specifically sought to protect from unconsented disclosure.[94] Protected records include, "but [are] not limited to," information relating to an individual's (1) "education," (2) "financial transactions," and (3) medical, (4) criminal, or (5) employment history.[95] Congress explicitly carved out numerous exemptions to the general rule that prohibits unconsented disclosures.[96] There are some exemptions for disclosure between agencies—for example, for national security and law enforcement purposes—and a broad congressional-disclosure exemption, which allows agencies to disclose records to "either House of Congress" and "any committee or subcommittee thereof" without threat of sanction.[97]

Finally, as discussed above, FOIA contains numerous exceptions protecting certain types of agency information from disclosure.[98] FOIA recognizes that in these areas, either the government itself or a third party has an interest in keeping information confidential.

3. *Office of Government Ethics Regulations*

The Standards of Ethical Conduct for Employees of the Executive Branch, promulgated by the Office of Government Ethics ("OGE"), include a rule pertaining to the use of nonpublic information.[99] Its general prohibition states: "An employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure."[100]

89. Privacy Act, Pub. L. No. 93-579, § 2(b), 88 Stat. 1896, 1896 (1974).
90. 5 U.S.C. § 552a; Devine v. United States, 202 F.3d 547, 550 (2d Cir. 2000).
91. 5 U.S.C. § 552a(b).
92. *Id.* § 552a(a)(4).
93. *Id.*
94. *Id.*
95. *Id.*
96. *See, e.g.*, *id.* § 552a(b)(1)–(12).
97. *Id.* § 552a(b)(9); *see also* Devine v. United States, 202 F.3d 547, 551 (2d Cir. 2000).
98. *See supra* note 51 and accompanying text.
99. 5 C.F.R. § 2635.703 (2013).
100. *Id.* § 2635.703(a). For purposes of this prohibition, nonpublic information is defined as:

The phrase "knowing," together with the rest of the provision, implies some knowledge by the employee not only that a disclosure is unauthorized but that the information will be used in a financial transaction.

The OGE provides five specific examples in the rule itself. One of these examples involves a federal employee purchasing stock in a defense contractor that will be awarded a Navy contract, which the OGE observes may violate both the rule and federal insider trading laws.[101] Although that example also warns against advising "friends or relatives" to purchase stock, neither that example nor any of the others involve selective disclosure of nonpublic information to outsiders for apparently legitimate reasons. Private briefings of the sort that Treasury Secretary Paulson gave to hedge fund and private equity managers in the wake of the 2008 financial crisis, for instance, are not addressed in the examples. Another common scenario—discussion of nonpublic government information at political fundraisers and other unofficial social events—also is not mentioned in any of the examples accompanying the rule or in subsequent interpretive guidance on the rule. Some agencies—including the SEC—provide interpretive guidance on the rule for their own employees.[102] But much of this guidance simply restates the text of the OGE rule and does not address situations where agency officials are not seeking to personally benefit from their selective disclosures. Private briefings and meetings may be a legitimate means of gathering valuable feedback, insight, and analysis from the investment community.

4. Agency-Specific Regulations and Policies

a. A Snapshot of Typical Provisions

Many federal agencies have specific rules, policies, and procedures for protecting confidential information from disclosure. For example, in its Rules of Conduct for Employees, the Department of the Treasury

> information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public. It includes information that he knows or reasonably should know: (1) Is routinely exempt from disclosure under 5 U.S.C. 552 or otherwise protected from disclosure by statute, Executive order or regulation; (2) Is designated as confidential by an agency; or (3) Has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

Id. § 2635.703(b).

101. *See id.* § 2635.703 (Example 1) ("A Navy employee learns in the course of her duties that a small corporation will be awarded a Navy contract for electrical test equipment. She may not take any action to purchase stock in the corporation or its suppliers and she may not advise friends or relatives to do so until after public announcement of the award. Such actions could violate Federal securities statutes as well as this section.").

102. *See* Adoption of Supplemental Standards of Ethical Conduct for Members and Employees of the Securities and Exchange Commission and Revisions to the Commission's Ethics Rules, 75 Fed. Reg. 42,270 (July 20, 2010) ("Rule 2635.703(b) states that nonpublic information is information that the individual gains through his or her Federal position, which the person knows or reasonably should know is not available to the general public. Under this definition, nonpublic information includes information routinely exempt from disclosure under the Freedom of Information Act, 5 U.S.C. 552 or otherwise protected by statute, rule, or Executive Order; information that the Commission designates as confidential; and information that is not generally available to the public and that the Commission has not actually released or disseminated.").

emphasizes both protection of confidential information and prompt disclosure of other information: "Employees shall not disclose official information without proper authority, pursuant to Department or bureau regulation. Employees authorized to make disclosures should respond promptly and courteously to requests from the public for information when permitted to do so by law."[103] The Department of Commerce also has rules for the protection of information provided by third parties as well as rules assuring that information that is not confidential is publicly disclosed upon request.[104] The DOJ provides guidance on disclosure of confidential information in public speeches,[105] and reminds employees of OGE regulations banning use or disclosure of nonpublic information for use in financial transactions.[106] The Department of State seeks to protect broad categories of "sensitive but unclassified" ("SBU") information.[107] The Department of Energy,[108] the Department of the Interior,[109] and the Department of Housing & Urban Affairs[110] likewise provide guidelines on the handling of confidential information.

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103. 31 C.F.R. § 0.206 (citations omitted); *see also id.* § 1.10(b) ("Information with respect to activities of the Department not a matter of record shall not be disclosed if the information involves matters exempt from disclosure under 5 U.S.C. 552 or the regulations in this part, or if the disclosure of such information would give the person requesting the information advantages not accorded to other citizens.").

104. *See, e.g.*, 15 C.F.R. § 30.60 (providing for the confidentiality of electronic export information).

105. *See* U.S. DEP'T OF JUSTICE, ETHICS HANDBOOK 5 (2010), http://www.justice.gov/jmd/ethics/ethics_handbook.pdf ("When you are teaching, speaking or writing in your private capacity, you may not use nonpublic information, nor should there be any use of your official title except as a biographical detail or where there is a disclaimer.").

106. *Id.* at 9 ("You may not engage in a financial transaction using nonpublic information or allow the use of such information to further your private interests or those of another. Nonpublic information is information you gain on the job and which has not been made available to the general public and is not authorized to be made available on request.").

107. U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL VOLUME 12: DIPLOMATIC SECURITY 1 (2011), http://www.state.gov/documents/organization/88404.pdf ("Sensitive but unclassified (SBU) information is information that is not classified for national security reasons, but that warrants/requires administrative control and protection from public or other unauthorized disclosure for other reasons."); *see also id.* at 3 ("Before distributing any SBU information, employees must be sure that such distribution is permissible and, when required, specifically authorized. (See 5 FAM 470.)").

108. U.S. DEP'T OF ENERGY, HANDBOOK ON OVERSEAS ASSIGNMENTS 42 (2011), http://energy.gov/hc/downloads/handbook-overseas-assignments ("The Staff Member, as a U.S. Government employee, is subject to 18 U.S.C. 1905, which specifies punishment for unauthorized disclosure of confidential information by fine or imprisonment, or both, and removal from office or employment.").

109. DEP'T OF THE INTERIOR, DEPARTMENTAL MANUAL 9 (2012), *available at* http://elips.doi.gov/elips/Browse.aspx?startid=1552&dbid=0 ("Employees may engage in public communications regarding the programs, operations, and activities of the Department, including matters related to their official duties, or based primarily on knowledge acquired through official duties, provided that . . . [t]hey do not disclose information protected from disclosure by statute, regulation, Executive Order, or other Executive Branch or Departmental policies or directives, including classified information and controlled unclassified information such as personally identifiable information, and information protected by the Trade Secrets Act, 18 USC § 1905, Privacy Act, 5 USC §552(a), and Freedom of Information Act, 5 U.S.C. § 552 (FOIA).").

110. DEP'T OF HOUSING & URBAN DEV., INFORMATION TECHNOLOGY SECURITY POLICY 1 (2013), http://portal.hud.gov/hudportal/documents/huddoc?id=240025C10H.pdf ("Information security policies are designed to preserve the confidentiality, integrity, availability, and value of assets, as well as ensure the continued delivery of services. They also establish the appropriate focus and standards for acceptable security practices across an organization. This policy is based on federal regulations

At least one agency, the Federal Housing Finance Agency ("FHFA"), specifically addresses the implicit violation of the OGE rule barring misuse of confidential information that occurs when an agency employee makes an investment recommendation concerning the securities of a regulated entity. The FHFA, working with the staff of OGE, drafted its own ethics rules prohibiting FHFA employees from making such recommendations.[111] As the FHFA explained:

> [Section 9001.108 of the FHFA ethics rules] supplements 5 CFR 2635.703 in that it expressly prohibits FHFA employees from using or creating the appearance of using information that is not available to the general public to further a private interest. The prohibition is also intended to eliminate any misunderstanding or harm that could result from such a recommendation. For example, an investor should not be misled into believing, pursuant to the recommendation of an FHFA employee, that the securities of a particular regulated entity regulated by FHFA is a sound buy because the investor believes that the employee may have access to inside information.[112]

The FHFA rule does not, however, expressly address a situation where a FHFA employee does not go so far as to make an implicit "recommendation" but nonetheless selectively discloses nonpublic information about a regulated entity to an outside person who the employee knows is likely to be trading in securities markets.

Other agencies provide their employees with specific and targeted warnings about certain disclosures to persons outside the agency. The Air Force, for instance, is particularly concerned about disclosure of confidential information in employment negotiations with the private sector and thus warns that "[e]mployees may not disclose 'non-public information' to companies with which they are seeking employment."[113] Yet another problematic context in the military, as well as in other parts of the government, is inadvertent disclosure of confidential information to federal contractors who are present in the federal workplace.[114] The Department of Defense advises that nonpublic information should not be released to contractors unless the information is within the scope of the contract, there is a "need to know," and the contactor's employees have signed a nondisclosure agreement.[115] And the Department of Homeland

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and highlights HUD's goals and requirements for protecting its information and information system assets.").

111. 5 C.F.R. § 9001.108 (2013) ("Employees shall not make any recommendation or suggestion, directly or indirectly, concerning the acquisition, sale, or divestiture of securities of a regulated entity.").

112. Supplemental Standards of Ethical Conduct for Employees of the Federal Housing Finance Agency, 75 Fed. Reg. 52,607-01 (Aug. 27, 2010).

113. AIR FORCE MATERIAL COMMAND LAW OFFICE, DESKTOP ETHICS GUIDE FOR AIR FORCE MEMBERS AND EMPLOYEES 17 (1998), http://www.robins.af.mil/shared/media/document/afd-090115-084.pdf.

114. DEP'T OF DEFENSE, ETHICS ISSUES INVOLVING CONTRACTORS IN THE FEDERAL WORKPLACE 18 (2006), http://www.dod.mil/dodgc/defense_ethics/resource_library/contractors_in_workplace.pdf (citing 5 C.F.R. § 2635.703).

115. *Id.* at 19 ("No information should be provided contractor employees unless they have executed a non-disclosure agreement.").

Security ("DHS") is particularly careful about protecting a category of information called "personally identifiable information" ("PII") from abuse.[116] Although the contemplated abuses presumably do not involve misuse of information for trading in financial markets, DHS procedures for protecting confidential nonclassified information are more detailed than in many agencies.

b. Additional Precautions for Market-Sensitive Information

Most agency policies on the disclosure of nonpublic information do not discuss specifically the fact that some such information is market sensitive, although several agencies have responded explicitly to potential abuses of agency information in commodities and securities markets. Such agencies already go to great lengths to ensure that the release of market-sensitive information to the public is handled in a way that is fair to all investors.

The Department of Agriculture ("USDA") was the first federal agency to take this problem seriously after a 1905 scandal in which the Department's cotton crop estimates were leaked to commodities traders before they were publicly announced (a Department employee had raised and lowered window shades to signal the general direction of the crop estimates to speculators positioned across the street).[117] The Department's Agricultural Statistics Service subsequently developed strict procedures for release of crop estimates and similar confidential information. The procedures, which are still in use, include sequestration of nonpublic crop data in designated locations inside USDA buildings behind armed guards[118] (Much of this data is reported from regional offices for compilation into national statistics.). Once a "lock-up" time begins after the arrival of nonpublic crop data, persons entering the restricted area—including in one instance a soda delivery man who inadvertently entered to fill vending machines and in another instance the Secretary of Agriculture himself—are not allowed to leave until the crop statistics are publicly announced.[119] Sometimes this means having to stay overnight.[120]

More recently, the Department of Labor ("DOL"), the Department of the Treasury, and several other agencies, in response to a 2007 FBI and SEC investigation of alleged leaks, reinforced security procedures for release of market sensitive statistics such as the monthly Consumer

116. DEP'T OF HOMELAND SEC., HANDBOOK FOR SAFEGUARDING SENSITIVE PERSONALLY IDENTIFIABLE INFORMATION 4 (2011), http://www.dhs.gov/xlibrary/assets/privacy/privacy_guide_spii_handbook.pdf ("Sensitive PII is personally identifiable information, which if lost, compromised, or disclosed without authorization, could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual.").

117. *See* RICH ALLEN, U.S. DEP'T OF AGRIC., SAFEGUARDING AMERICA'S AGRICULTURAL STATISTICS: A CENTURY OF SUCCESSFUL AND SECURE PROCEDURES, 1905–2005, 1–2 (2007).

118. *Id.* at 23.

119. *Id.* at 32.

120. *Id.* at 23.

Price Index, gas prices, home sales, and the unemployment rate.[121] Such data, like the USDA crop statistics, are kept inside a lockup room until they are released to news organizations inside the lockup room at an appointed time. Amidst controversy in 2012, the DOL banned certain news organizations from the lockup room upon learning that those news organizations were operating as conduits for hedge funds and transmitting the data instantly for trading purposes immediately upon release of the data.[122] Because many hedge funds use computerized trading programs that are determined in advance, instantaneous communication of the DOL data to a hedge fund computer can almost instantaneously result in a trade, meaning trades are being placed from inside the government lock-up room before the market as a whole has had an opportunity to absorb the information. Other organizations were asked to replace their computers in the lockup room with new computers that could not be linked automatically to specialized trading models.[123] The DOL's intent is to provide its data only to genuine news organizations that will release the data to the public, or at least to a broad base of subscribers, immediately upon release of DOL's news embargo.[124]

In 2000, the Federal Communications Commission ("FCC") amended its rules to prohibit disclosure of nonpublic internal Commission draft orders and other documents in market-sensitive proceedings.[125] These rules also bar regulated entities and persons practicing before the FCC from "further distribution or use" of any information that has been inadvertently received from the FCC.[126] The FCC specifically mentioned that the new rule was responding to "recent" unauthorized disclosures about market sensitive cases.[127]

The Federal Reserve's Federal Open Market Committee ("FOMC"), which sets short-term interest rates for interbank loans, is another obvious focal point for nonpublic market-sensitive information.[128] Although the FOIA requires federal agencies to produce cer-

121. *See* John H. Cushman, Jr., *U.S. Tightens Security for Economic Data*, N.Y. TIMES (July 16, 2012), http://www.nytimes.com/2012/07/17/business/labor-dept-tightens-security-for-market-sensitive-data.html?_r=0 (reporting that the DOL guards the monthly CPI "with launch-code secrecy, a precaution against anyone who might try to take advantage of an accidental or a surreptitious leak to gain an insider's edge in the financial markets, turning milliseconds into millions").

122. *Id.*

123. *Id.*

124. *See id.*

125. 47 C.F.R. § 19.735–203 (2014).

126. *Id.*

127. *See* Amendment of Section 19.735-203, 15 FCC Rcd. 20,622, 20,622 (Oct. 18, 2000) ("The purpose of the amendment is to emphasize the responsibilities of Commission employees in this area and to provide guidance to persons who receive nonpublic documents under circumstances where it appears that the release of the documents was either inadvertent or otherwise unauthorized.").

128. Congress in 12 U.S.C. § 263 created the FOMC, which consists of members of the Board of Governors of the Federal Reserve System and five representatives of the Federal Reserve banks elected annually by members of the Board of Governors. The Board of Governors of the Federal Reserve is required to keep records of action on policy relating to open-market operations under 12 U.S.C. § 247a. *See* 12 C.F.R. § 271.7 (2014) (concerning the FMOC's disclosure of its records).

tain information upon request,[129] many records of the FOMC are exempt from disclosure.[130] There is also a broad regulatory prohibition against disclosure of FOMC information.[131] Nonetheless, there have been incidents where selective disclosure of FOMC information has been alleged, including when the President of the Federal Reserve Bank of Richmond claimed in 2007 that then-New York Fed Chairman and FOMC member Timothy Geithner had shared with Bank of America too much information about a planned rate cut.[132]

In June of 2011, perhaps in response to earlier incidents of selective disclosure, the FOMC adopted a "Policy on External Communications of Committee Participants." FOMC participants must "carefully safeguard all confidential information."[133] In addition, "[n]o confidential FOMC information may be released except pursuant to Committee instructions or with written authorization from the Chairman and prompt notification to the FOMC."[134] Moreover, Committee members must "refrain from describing their personal views about monetary policy in any meeting or conversation with any individual, firm, or organization who could profit financially from acquiring that information unless those views have already been expressed in their public communications."[135] The FOMC policy imposes a blackout period on monetary policy communications, during which participants must "refrain from expressing their views about macroeconomic developments or monetary policy issues in meetings or conversations with members of the public."[136]

The FOMC in June of 2012 reaffirmed its policy in a "Program for Security of FOMC Information," which also defines confidential FOMC information that cannot be released to the public:

> Confidential FOMC information includes all privileged information that comes into the possession of the governors, Federal Reserve Bank presidents, or Federal Reserve System staff in the performance of their duties for, or pursuant to the direction of, the Committee. Such information covers, but is not limited to, expressions of policy views at FOMC meetings, reasons for those views, votes of

129. *See* 5 U.S.C. § 552(a) (2012).

130. 12 C.F.R. § 271.7(a) (2014).

131. *Id.* § 271.7(e) ("Except as provided in this part, no officer, employee, or agent of the Committee or any Federal Reserve Bank shall disclose or permit the disclosure of any unpublished information of the Committee to any person (other than Committee officers, employees, or agents properly entitled to such information for the performance of official duties).").

132. *See* Nelson D. Schwartz, *Transcripts Revive a Tiff of Two Fed Presidents*, N.Y. TIMES, Jan. 18, 2013, http://www.nytimes.com/2013/01/19/business/transcripts-revive-a-tiff-of-two-fed-presidents.html.

133. BD. OF GOVERNORS OF THE FED. RESERVE SYS., FOMC POLICY ON EXTERNAL COMMUNICATIONS OF COMMITTEE PARTICIPANTS 1 (2013), http://www.federalreserve.gov/monetarypolicy/files/FOMC_ExtCommunicationParticipants.pdf.

134. *Id.*

135. *Id.*

136. *Id.* at 2.

> the Committee, and staff forecasts. The information that must be kept confidential may be in any form.[137]

This information is categorized into three different classes, with different treatments for each class.[138] Most confidential FOMC documents are publicly available after a lag time of about five years.[139]

The Federal Reserve in 2012 issued a separate policy on external communications by Federal Reserve System Staff.[140] The policy is similar to that for FOMC members.[141]

C. *Policies and Customs in Congress*

Although much information known to Congress, or to congressional committees and individual members and their staffs, is undoubtedly "nonpublic," there is substantial uncertainty as to whether and when such information can or should be regarded as "confidential." On the one hand, Congress supports a "fundamental policy" that generally favors "openness and public access to information."[142] Among other places, this policy is reflected in the Constitution's dictate that "[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . ."[143] On the other hand, as a former Chief Counsel of both the Senate and House Ethics Committees has observed, "[t]he rules of some committees . . . explicitly impose obligations of confidentiality on committee members and staff with respect to committee information . . . [or] with respect to specific classes of information."[144] He pointed to the ethics committees and the intelligence committees of both the House and the Senate as principal examples, but he emphasized as well that "[t]he rules of many other committees of the House and Senate [ ] do not im-

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137. BD. OF GOVERNORS OF THE FED. RESERVE SYS., PROGRAM FOR SECURITY OF FOMC INFORMATION 1 (2014), http://www.federalreserve.gov/monetarypolicy/files/FOMC_InformationSecurityProgram.pdf.

138. *Id.*

139. *Id.* at 3.

140. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., FOMC POLICY ON EXTERNAL COMMUNICATIONS OF FEDERAL RESERVE SYSTEM STAFF (2013), http://www.federalreserve.gov/monetarypolicy/files/FOMC_ExtCommunicationStaff.pdf. The policy instructs staff members to "refrain from disseminating information outside the Federal Reserve System" unless it has already been made "widely available to the public," and it references, in particular, "information about economic and financial conditions or about the methods and tools that are currently being used to assess those conditions, that might allow an individual, firm, or organization to profit financially." *Id.* ¶ 5. The policy further provides that "[s]taff will strive to ensure that their contacts with members of the public do not provide any profit-making person, firm, or organization with a prestige advantage over its competitors" and that staff members "will consider this principle carefully and rigorously in considering invitations to speak at meetings sponsored by profit-making organizations and in scheduling meetings with anyone who might benefit financially from apparently-exclusive contacts with Federal Reserve staff." *Id.* ¶ 6.

141. *See id.* at 1 nn.1–2.

142. 138 CONG. REC. S17835-04 (daily ed. Oct. 8, 1992) (statement of Sen. George Mitchell).

143. U.S. CONST. art. I, § 5, cl. 3.

144. *See The Stop Trading on Congressional Knowledge Act: Hearing on H.R. 1148 Before the H. Comm. on Financial Servs.*, 112th Cong. 100–01 (Dec. 6, 2011) (written statement of Robert L. Walker, of Counsel, Wiley Rein LLP).

pose any specific duties of confidentiality with respect to committee information."[145]

In theory at least, the consequences for revealing confidential congressional information may be severe. In the Senate, Standing Rule 29(5) provides that:

> Any Senator, officer, or employee of the Senate who shall disclose the secret or confidential business or proceedings of the Senate, including the business and proceedings of the committees, subcommittees, and offices of the Senate, shall be liable, if a Senator, to suffer expulsion from the body; and if an officer or employee, to dismissal from the service of the Senate, and to punishment for contempt.[146]

In the view of some, including former Senate Majority Leader George Mitchell, "the words secret and confidential [as used in the rule] refer to all information the Senate treats as confidential, including information received in closed session, information obtained in the confidential phases of investigations, and classified national security information."[147] Although there does not appear to be an antileak analogue to Rule 29(5) in the House, the revelation of certain types of confidential information by members of either chamber or their staffs could nonetheless be sanctioned as a type of "disorderly behaviour."[148] Of course, all of this begs the question as to what it means for information in Congress to be "treated" as confidential.

The nebulous meaning of "confidentiality" in Congress is a likely explanation for why breaches occur routinely and disciplinary actions are rare. Indeed, many view Capitol Hill as a place "where leaking information is as burnished an art form as backslapping and grinning on demand."[149] To take just one instance of the dissonance: When Senator Bernie Sanders (I-VT) posted on his congressional website proprietary trading data that were provided to the Commodity Futures Trading

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145. *Id.* at 102.

146. THE STANDING RULES OF THE SENATE, SENATE MANUAL, S. DOC. NO. 112-1, at R. XXIX(5) (2012), http://www.gpo.gov/fdsys/pkg/SMAN-112/pdf/SMAN-112-pg55.pdf.

147. 138 CONG. REC. S17835-04 (daily ed. Oct. 8, 1992) (statement of Sen. George Mitchell). The placement, however, of Rule 29(5)—among other subparagraphs under the general caption "Executive Sessions"—could support a different interpretation that would narrow that rule considerably to only executive and treaty-related communications. *See* Andrew George, *Public (Self)-Service: Illegal Trading on Confidential Congressional Information*, 2 HARV. L. & POL'Y REV. 161, 167 (2008) (acknowledging narrow reading based on placement, but favoring broad construction by Senator Mitchell).

148. U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and with the Concurrence of two-thirds, expel a Member."); *see In re* Chapman, 166 U.S. 661, 669–70 (1897) (observing that the right to punish "extends to all cases where the offence is such as in the judgment of the Senate [or the House of Representatives] is inconsistent with the trust and duty of a member").

149. Editorial, *Shh! Senate at Work on a National Secret,* N.Y. TIMES, Aug. 3, 2013, http://www.nytimes.com/2013/08/03/opinion/shh-senate-at-work-on-a-national-secret.html?_r=0 (commenting on a plan by leaders of the Senate Finance Committee to encourage candid views from members on which tax credits and deductions should be stricken from the tax code, and sardonically observing that the press "got word of the secret secrecy plan from one of the capital's ubiquitous anonymous sources").

Commission ("CFTC") by investment banks pursuant to a stipulation of confidentiality, he later defended his actions as an "appropriate [way] to lift the veil of secrecy in the oil futures market," which furthered the general public's "right to know how much excessive speculation has driven up oil prices and which Wall Street firms are doing it."[150] Senator Sanders' decision to release the information generated disapproval from some colleagues as well as criticism by former CFTC commissioners[151] and the Futures Industry Association ("FIA").[152] But legal experts generally agreed that what he did was not illegal,[153] and the incident did not result in official discipline by the Senate. Moreover, any investigation (much less prosecution) by government officials outside the Senate would have been thwarted by the Constitution's Speech or Debate Clause, which shields lawmakers and their staffs from being "questioned in any other Place" about legislative acts.[154]

III. COUNTERVAILING CONSIDERATIONS AND TRADEOFFS CURTAILING SECURITIES TRANSACTIONS BASED ON POLITICAL INTELLIGENCE

The path toward fairer government disclosure—and the concomitant reduction of securities trading based on political intelligence—will require a careful balancing of many interests and priorities. Indeed, a whole range of constitutional and policy considerations must be taken into account with any approach to regulating selective disclosure that risks interfering with the rights of citizens to engage in conversations with government officials about their concerns, hopes, and grievances. Curbing the practice of selective disclosure, for instance, could impede transparency and could insulate government processes and decision-

150. Bernie Sanders, Editorial, *Wall Street's Secret Oil Games*, HUFFINGTON POST (Sept. 16, 2011), www.huffingtonpost.com/rep-bernie-sanders/wall-streets-secret-oil-g_b_966286.html.

151. James E. Newsome & Fred Hatfield, Editorial, *Sen. Bernie Sanders Market Data Leak Deserves Investigation*, WASH. POST, Sept. 8, 2011, http://www.washingtonpost.com/opinions/sen-bernie-sanderss-market-data-leak-deserves-investigation/2011/09/08/gIQA0fiEDK_story.html (contending that the futures market data were "submitted in good faith by various individuals and companies in energy and other commodities with the understanding that they will be protected by law, because of the information's proprietary nature and value").

152. Daniel P. Collins, *FIA Outraged over Leaked Info*, FUTURES MAG. (Oct. 1, 2011), http://www.futuresmag.com/2011/10/01/fia-outraged-over-leaked-info (quoting FIA letter to CFTC stating that its members were "shocked and outraged by the disclosure of confidential data on derivatives market positions" and that the leak "poses a serious threat to the confidence of market participants in the CFTC's ability to protect proprietary information").

153. Brian Scheid, *Legal Sources Do Not Believe Sanders Energy Trading Data Leak Violates Law*, PLATTS GAS MKT. REP., Sept. 2, 2011, *available at* 2011 WLNR 18455785.

154. U.S. CONST. art. I, § 6, cl. 1. The practical result is that congressional self-discipline is the sole avenue for addressing ethical transgressions involving legislative activity. *But see* Gravel v. United States, 408 U.S. 606, 625–27 (1972) (holding that while the Speech or Debate Clause protects a senator and his aide who read the top-secret classified "Pentagon Papers" into the public record of a subcommittee proceeding, the Clause did not protect their arrangement with a private party to publish the classified documents in a book because that action was not related to the "due functioning of the legislative process").

making from scrutiny by outside persons and organizations.[155] And an overly harsh policy against selective disclosure might also interfere with the ability of government officials to learn valuable information from their interaction with important constituencies: information exchange between government and outsiders is often a process of give and take, and preventing information from unfairly reaching some investors should not come at the expense of government officials getting the information they need to do their jobs.[156]

A second tradeoff to consider is whether policymakers should err on the side of over-policing or under-policing the disclosure of material nonpublic government information. The principal argument that policymakers should err on the side of under-policing is that an overly aggressive Fairer Government Disclosure ("FGD") regime might significantly reduce transparency by discouraging disclosure of nonpublic information to anybody. Indeed, a strict FGD regime could even be used by political superiors as a way to keep subordinates from talking with the press, notwithstanding the fact that an occasional leak may be beneficial to the overarching goal of government transparency.[157] On the other hand, over-policing by encouraging or requiring public disclosure of copious amounts of government information does not undermine the transparency norm, but public disclosure of too much information could in some instances undermine government effectiveness.

Yet another tradeoff is between government interests—in fairer disclosure, agency or legislative effectiveness, and transparency—and the interests of third parties in keeping information confidential. Information about government policy (e.g., a new regulation or the Fed changing the discount rate), or economically significant statistical information the government has compiled (e.g., USDA crop reports, DOL employment statistics) usually is not affected by this tradeoff. Other information, however, also belongs to private persons who expect that it will be kept confidential and in some cases have a legal right to have it kept confidential.[158] A host of statutes already protect much of this information from selective disclosure.[159] Thus, in instances where selective disclosure would violate the rights or legitimate expectations of a third party, an FGD regime that emphasizes public disclosure of information as a prophylactic measure will not be a viable alternative.

155. *See* GAO POLITICAL INTELLIGENCE STUDY, *supra* note 32, at 21 (observing that some interviewees emphasized that "under the First Amendment there is a constitutional right to participate in the political process and that [the proposed registration and reporting requirements] could impede that process").

156. *See id.* (discussing observations by some that a "slowdown of communication could [ ] affect Congress as they often consult with interested parties when crafting legislation which could in some cases be considered political intelligence").

157. *See* Pozen, *supra* note 27, at 14–16 (discussing the various rationales for leaking).

158. *See supra* notes 149–54 and accompanying text (discussing Senator Bernie Sanders's decision in 2011 to post on his congressional website proprietary trading data provided by investment banks to the CFTC).

159. *See supra* Part II.B.

There will also be tradeoffs between fairer disclosure and the government's effectiveness. There are some situations where backroom meetings—and the selective disclosure that comes with them—are needed for an agency or the legislative branch to do its job. The DOJ and federal regulatory agencies, for example, theoretically could be required to conduct settlement negotiations for enforcement actions only in public—live streaming settlement discussions on the agency website, including all phone calls to opposing counsel. Such, however, would be a radical departure from the way in which settlement is currently handled and settlement talks would probably be much less effective as a result.[160] The same may be true for bank inspections, negotiation of government contracts, and many other interactions between the government and private parties.

Government bailouts of private companies are regarded by some as a bad idea, and the selective disclosure that comes with them is one of many problems with bailouts.[161] But bailouts that do occur will probably need to be negotiated the same way other corporate deals are negotiated, which is usually in private until a deal is announced.[162] Requiring the government to conduct all negotiations in public—and not to approach in private the potential third-party buyers of a failed entity—would severely compromise the government's negotiating position and could cost taxpayers billions of dollars.[163] In most of these contexts, however, disclosure of information to uninvolved third parties may not be necessary.[164] And in instances where such disclosure does in fact further an important government objective, steps can be taken to curtail the risk of securities trading on the basis of material nonpublic government information.[165]

Furthermore, there are institutional considerations about whether to use detailed rules or standards to achieve fairer government disclosure.[166] Government decision-makers and their lawyers often prefer detailed rules, but rules can be difficult to draft for a problem as broad and sometimes elusive as the selective disclosure of political intelligence. Rules can sometimes be easy to avoid because they are under-inclusive, and in other instances rules have unintended consequences because they

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160. *See* U.S. DEP'T OF JUSTICE, *Protecting Settlement Negotiations*, 6 FOIA UPDATE 4 (1985), *available at* http://www.justice.gov/oip/foia_updates/Vol_VI_4/page3.htm (noting that confidentiality of settlement agreements should be supported by exemptions from the FOIA).

161. *See* Claire Hill & Richard Painter, *Compromised Fiduciaries: Conflicts of Interest in Government and Business*, 95 MINN. L. REV. 1637, 1680 (2011).

162. *See* Steven Davidoff Solomon, *Employing Novel Ways of Negotiating Merger Deals*, N.Y. TIMES, July 18, 2012, http://dealbook.nytimes.com/2012/07/18/employing-novel-ways-of-negotiating-merger-deals/ (observing that secrecy in negotiations creates value and needs to be protected).

163. *See* JESWALD W. SALACUSE, SEVEN SECRETS FOR NEGOTIATING WITH GOVERNMENT 35 (2008) (noting efficiency of "purely private" negotiations).

164. *See supra* notes 1–3 and accompanying text (detailing media accounts of the July 2008 private meeting between then-U.S. Treasury Secretary Henry Paulson and about a dozen hedge fund and private equity firm managers).

165. *See* Nagy & Painter, *supra* note 21, at 1360 (suggesting greater use of confidentiality agreements with non-use components).

166. *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 568–69, 621 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 956–57 (1995).

are over-inclusive. For example, a detailed selective disclosure rule on communications with the press might discourage an agency employee from disclosing information to a newspaper reporter because the employee did not have time to verify the reporter's representation that his media organization did not provide advance news flashes to hedge funds. Standards, on the other hand, can sometimes be applied with a "rule of reason" approach, and without constantly having to consult agency lawyers. Decision-makers, however, are often nervous about standards that can be interpreted differently after the fact (whether information was subsequently used by someone for securities trading might be a factor that influences an adjudicator's determination made, with hindsight bias, about whether a regulatory standard prohibited its selective disclosure).

There is also the institutional choice between centralized decision-making and ensuring uniformity across the government (for example, by Congress in a federal statute), or decentralized decision-making by individual agencies and the diversity of approaches that comes with the decentralized approach. Imposing too much uniformity in government leak plugging and/or levee lowering raises concerns, as the agencies, their duties, and the types of information they possess are so different. Also, Congress when it imposes rules may not attach great value to agency effectiveness, perhaps preferring that political intelligence disclosures be a privilege reserved for members of the legislative branch. (Congress has rarely imposed uniformity in ethics rules across all three branches of government,[167] and often the rules crafted for the legislative branch are more lenient.[168]) On the other hand, there is reason to worry about agency officials abusing the discretion Congress gives them in this area to either (1) accommodate selective disclosure they want for political rather than policy reasons, and/or (2) "over-classify" information as confidential to reduce transparency.[169] One answer to this problem might be a statutory provision setting forth the procedures by which agencies can make decisions about selective disclosure (for example, a statute requiring that these determinations be made in agency rulemaking pursuant to the Administrative Procedure Act, including public notice and comment).

Finally, any attempts to curb securities trading based on political intelligence will encounter serious constitutional and policy difficulties if

167. *See, e.g.*, Donna M. Nagy, *Owning Stock While Making Law: An Agency Problem and a Fiduciary Solution*, 48 WAKE FOREST L. REV. 567, 569 (emphasizing that "the federal financial conflict statutes guarding against self-interested decision making by executive and judicial branch officials do not apply to Congress").

168. *See, e.g.*, Jeffrey H. Birnbaum, *Lobbying Bill Sparks Populist Uprising–on Both Sides*, WASH. POST, Mar. 6, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/03/05/AR2007030501370_pf.html (describing Congressional efforts to impose disclosure requirements on executive officials in the Executive Branch Reform Act of 2007).

169. *See* Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399, 401 (2009) ("In recent years, in fact, classification—specifically overclassification—has increased . . . ."); Meredith Fuchs, *Judging Secrecy: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 136–39 (2006) (discussing the dangers of overclassification).

government interferes with press freedom by telling news organizations how and when to disseminate information to their subscribers.[170] Government agencies can appropriately insist on giving information to news organizations with a broad subscription base before or at the same time as it is given to news organizations that principally serve a narrow subscription base (e.g., hedge funds). The DOL can, for example, seek to admit to press conferences where statistical data are released those news organizations with a broad subscription base, and the DOL may even be able to exclude "news" organizations that instead focus on providing instantaneous electronic communication of news to subscribers' computerized trading programs (e.g., the "reporter" takes a picture of the data on a DOL screen and the picture immediately results in execution of a trade by a subscriber's computer).[171] While any government effort to discriminate among news organizations raises important legal and public policy questions,[172] a solution that facilitates equal access to government information should be workable. On the other hand, government agencies—particularly law enforcement agencies—should not endeavor to direct news organizations as to what they can and cannot do with government information once they have obtained it.[173]

IV. ALTERNATIVE APPROACHES TO FAIRER GOVERNMENT DISCLOSURE

With an aim toward reducing the role of selectively revealed political intelligence in securities markets, we construct below several alternative approaches to formulating an FGD regime. Some of these approaches build upon existing rules and policies currently in place in the federal government. Other possible approaches are more specifically tailored to controlling the potential use of material nonpublic information in securities trading.

Our objective here is not to set forth a persuasive case for any one particular approach. Instead, we have chosen to highlight the potential advantages and disadvantages of several distinct (and in some instances competing) approaches. No single rule is likely to eradicate securities trading on the basis of selectively disclosed political intelligence, and

170. *See* GAO POLITICAL INTELLIGENCE STUDY, *supra* note 32, at 20 (observing that "First Amendment press protection" led some to conclude that any political intelligence registration and reporting requirements must include an exemption for the media).

171. *See* Cushman, *supra* note 121 (discussing the DOL's kerfuffle with "Need to Know News," a small enterprise owned by a German exchange whose "data goes directly from the [DOL] lock-ups to specialized trading programs").

172. The government's ability to discriminate among news organizations raises complex questions beyond the scope of this Article, though the answers may sometimes turn on the specific text of the statutes or rules that regulate public disclosures by particular agencies. Agency lawyers should explore these issues—perhaps in consultation with the Department of Justice's Office of Legal Counsel (OLC)—before implementing a briefing room policy.

173. *See infra* notes 215–16 and accompanying text (discussing the New York Attorney General's threatened enforcement action against Thompson-Reuters for its two-second advance notice of news about the University of Michigan's consumer confidence data).

even a combination of approaches will not eradicate all such trading. Thus, most of these alternatives are under-inclusive in that they allow selective disclosure of nonpublic government information to some persons who might use it for trading in securities markets. Some farther-reaching approaches to the problem could be costly and negatively impact government operations, unless agencies are given discretion to make exceptions.

We also worry that an FGD regime that relies on regulating private sector conduct such as gathering "political intelligence" could deter citizens from monitoring their government, which is essential in a democratic society.[174] For this reason, our proposals focus on regulating the conduct of federal officials. Some of our proposals, however, would encourage these officials to impose trading restrictions and confidentiality obligations on the private persons who receive government information.

A. Designing an FGD Regime

1. The Executive Branch

As it did nearly fifty years ago with the FOIA, Congress could enact an omnibus statute establishing a substantially broader disclosure framework that instructs each agency in the executive branch to promulgate rules that implement the statute for their own employees. Although agencies implementing this new FGD regime could be encouraged to consult with the SEC, the agencies themselves should develop and promulgate their own rules.

We recognize, of course, that in the absence of congressional action, the President could implement an FGD regime for the executive branch through an Executive Order. Our decision to frame these alternatives as legislative efforts should not be taken to imply that an FGD regime for federal agencies and departments cannot emanate from the executive branch itself.

a. An Omnibus Statute with Full Disclosure as a Starting Point

One approach to the selective disclosure problem would be to start with the transparency principle and assume that government should disclose as much information as possible. Thus, building on FOIA,[175] Congress could enact an omnibus statute that makes broad public dissemination—probably through websites—of agency information the norm rather than the exception. One component of this full disclosure statute

174. *See* Nagy & Painter, *supra* note 21, at 1325–26 (remarking on constitutional concerns involved in regulating political speech); *id.* at 1332–34 (describing problems associated with disclosure regimes that regulate private speech).

175. *See supra* note 48 and accompanying text (emphasizing that information released under the FOIA often remains nonpublic notwithstanding its release to the individual requestor).

would require that when an agency responds to a FOIA request with disclosure of information, the agency would post the same information on its website with an indication that it is being disclosed pursuant to a FOIA request.[176]

A second component of a full disclosure statute would require agencies to post on their websites information provided to members of Congress or to Congressional staff (For reasons explained below, regulating selective disclosure by elected officials to their constitutes poses special challenges, so agencies should at least be encouraged to publicly disclose information shared with Congress.). Here, however, there would have to be limited exceptions for circumstances where confidential agency communications with Congress are more appropriate.

Yet another more ambitious component of a full disclosure statute would attempt to reach a wider range of information by providing that, unless an exception is justified, all executive branch agencies publicly disclose all information about agency operations and agency decision-making, including but not limited to information that would be material to investors in publicly traded securities. Other countries, particularly in Europe, are already moving in this direction.[177] For example, the Netherlands is already implementing mandatory disclosure of government information in digital format.[178] A private organization has designed a web application called Nulpunt that will aggregate documents released by the Dutch government into an online database that allows users to request documents on topics they are interested in.[179] Private groups in the United States have likewise been advocating statutory

176. Such a requirement would substantially expand § 552(2)(D) of the FOIA, which instructs agencies to make available for inspection and copying all records that "have become or are likely to become the subject of subsequent requests for substantially the same records." *See supra* note 48.

177. *See* EUROPEAN COMM'N, DIGITAL AGENDA FOR EUROPE: A EUROPE 20/20 INITIATIVE, https://ec.europa.eu/digital-agenda/en/open-data-0 (last visited July18, 2014) (supporting "open data" laws for several reasons, including because such laws foster "participation of citizens in political and social life and increas[e] transparency of government").

178. *See* Roger Vleugels, *Dutch Green Party Proposes Revised FOI Law*, FREEDOMINFO.ORG (Jun. 18, 2012), http://www.freedominfo.org/2012/06/dutch-green-party-proposes-revised-foi-law/ (describing changes to the Dutch Law on Transparency of Public Authorities (Dutch: "Wet Openbaarheid van Bestuur")).

179. A video created by Nulpunt points out:

> A new Freedom of Information Act is in the making. This law enshrines public access to information as a citizen's right, and impels public authorities to make government information widely, and quickly, accessible in a digital format. It broadens the scope of the information to be made accessible, to include all information held by public bodies or private bodies with a public mandate or financed by taxpayers money. If government nevertheless wishes to keep information secret, this exemption will have to be justified on a case by case basis. The new law will guarantee that in the future all public documents produced by government will be automatically accessible, and that these will be stored in a permanent electronic record. These are the first steps to what we call the Leaking State [Dutch: "De Lekkende Overheid"].

Nulpunt, *Democracy Without Secrets*, VIMEO (June 6, 2012, 4:12 PM), http://vimeo.com/43562090; *see also id.* ("Nulpunt is a web application that aggregates all documents produced by the Dutch government and the public sector into an online database. Nulpunt asks users to register with the database and subscribe to feeds on topics of government information that he or she is interested in. From that moment on the user has access to all government documents relevant to the selected topics. Nulpunt makes it possible for registered users to comment on and share elements from these documents through third party social media and other channels.").

changes that would make real-time public disclosure of market-moving information more of a norm.[180]

There would, however, need to be exceptions to such a mandatory continuous disclosure regime (Implementing digital disclosure would also be more complicated and costly than in a smaller country such as the Netherlands.). Exceptions would have to include classified information; most information about ongoing agency investigations of particular persons or entities as well as information concerning concluded investigations where no wrongdoing was discovered; information about agency procurement decisions that needs to be kept confidential consistent with federal procurement policy; information entrusted to an agency by private persons or entities with an understanding that it remain confidential (most such information is already exempted from disclosure under FOIA); information about most agency personnel decisions; and certain other categories of information for which a nondisclosure norm is appropriate. An agency probably would also need to have power to promulgate rules creating additional categories of exceptions to the mandatory public disclosure rule, although a "sunset" provision could specify that agency-created exceptions would only last for a limited time (for instance, three years) unless they were renewed by the agency through the same rulemaking process.

Finally, an omnibus full disclosure statute could provide that if an agency has confidential information pursuant to one of the above exceptions, and that information for any reason is selectively disclosed to anyone outside the government, the agency would be required to publicly disclose the same information as soon as possible (the statute could, for example, require disclosure on the agency website). Such a statutory default rule requiring public disclosure immediately following selective disclosure would need to have at least two exceptions.

First, selective disclosure of agency information to persons outside the government will in some instances further legitimate agency objectives (A similar accommodation of public companies' necessary private communications with outsiders is embodied in Regulation FD.).[181] The statute could list broad categories of exceptions such as appropriate disclosures to government contractors, to persons being investigated by the agency and to their lawyers, to persons considering employment with the agency, to self-regulatory organizations ("SRO"), and to foreign governments and subdivisions thereof. Agencies would then be empowered to create additional "selective disclosure" categories by rulemaking. Se-

180. *See, e.g.*, RIGHT TO KNOW CMTY., MOVING TOWARD A 21ST CENTURY RIGHT-TO-KNOW AGENDA: RECOMMENDATIONS TO PRESIDENT-ELECT OBAMA AND CONGRESS 1–2 (2008), http://www.foreffectivegov.org/files/21strtkrecs.pdf (advocating for "a government where . . . federal agencies proactively disseminate information to the public in timely, easy-to-find, and searchable formats" and calling upon President Obama and Congress to "act decisively to achieve this vision"); *see also* Part II.A.3 (discussing recent open-government initiatives in the Executive Branch).

181. *See* Nagy & Painter, *supra* note 21, at 1345–46.

lective disclosures made pursuant to these exceptions would not require immediate public disclosure of the same information.

Second, there will be some situations where even if there has been inappropriate selective disclosure of agency information, there remains a substantial government interest in keeping that information confidential to the extent possible.[182] In these situations, remedial measures other than public disclosure of the information will be needed—for example, recipients of the improperly disclosed information could be requested to sign a confidentiality agreement and to promise not to use the information for securities trading. In order to use this exception and deviate from the presumed remedy of prompt public disclosure, the agency head or general counsel should probably be required to document in writing the reasons he or she believes public disclosure of information that has already been selectively disclosed undermines a substantial government interest as well as the alternative measures that have been implemented to prevent use of the information in securities trading.

Yet another area where public disclosure could be required is the time, place, and general topic of meetings between senior agency officials and outside parties, except in circumstances where there is a specific agency interest in keeping those meetings confidential.[183] The time and place of meetings and the names of attendees—information often found on senior agency officials' calendars—could be posted on agency websites. Details about the content of those meetings might not be disclosed, but the disclosure of the meeting itself (e.g., "Treasury Secretary meeting with XYZ hedge fund") would provide some information about who senior agency officials are meeting with and why. Public disclosure of the meeting itself—even without details about the meeting—would probably also discourage inappropriate selective disclosure of nonpublic information.

One difficulty with an approach that uses transparency as a starting point, however, is that a lot of information that government agencies learn should not be public, or at least should not be public right away. Examples perhaps include the leanings of a FCC commissioner who has not yet made up his mind about a proposed telecom merger, information the DHS has about possible weaknesses in a particular airport screening device, or information the DOJ has learned about the trading activities at a major investment bank. In many of these instances, it might not be appropriate to rely on mandatory public disclosure as a remedy for inappropriate selective disclosure. Exceptions to the mandatory disclosure rule thus would become so numerous that the rule could become cumbersome to administer and largely irrelevant.

182. *See, e.g.*, *id.* at 1354 (noting potentially legitimate reasons for maintaining confidentiality).

183. *See id.* at 1359 (observing that the Sunlight Foundation launched an "Operation Punch Clock" campaign that encouraged members of Congress to post their official duty schedules on the Internet).

b. An Omnibus Statute with Confidentiality as a Starting Point

An effective FGD regime might have to use confidentiality rather than disclosure as a starting point, and then require agencies to implement rules that prevent inappropriate selective disclosure of whatever information is confidential. For example, an FGD regime could permit disclosure of nonpublic government information only on a "need to know" basis, unless the agency chooses to make public disclosure of the same information. The rule could be modeled on the existing requirement that classified information only be disclosed to persons who have the proper security clearance and a need to know.[184] The selective disclosure rule for nonclassified government information would not involve security clearance designations for individuals, but would require that recipients of nonpublic government information have a demonstrable need to know the information that is related to legitimate government functions.

Again borrowing from the security clearance levels used to protect classified information, nonpublic government information could be categorized based on the risk that it could be used to gain an unfair advantage in trading markets. Instead of the "confidential," "secret," and "top secret" categories for classified information based on its importance to national security, categories could use such terms as "market sensitive" or "highly market sensitive." Agency staff would be required to use their best efforts to determine whether nonpublic information in their possession would be material (important) to investors in one or more publicly traded securities and, if so, to designate the information as "market sensitive," and whether the information would also likely have a substantial effect on the market price of one or more publicly traded securities and, if so, to designate the information as "highly market sensitive" (A new regulation of offshore oil drilling might fall in the first category and the likely failure of a large financial institution might fall in the second category.). The "higher" the category level assigned to the information, the more precautions would be taken by the agency to prevent its unauthorized selective disclosure prior to its public disclosure. Selective disclosure of higher-category information would also require documentation of the recipient's need to know as well as documentation of a relationship of trust and confidence between the recipient of the information and the government.

The process for designating information as "market sensitive" or "highly market sensitive" could also borrow from the process government agencies use for classifying information for national security purposes. Agency officials at an appropriate level of seniority (perhaps Associate Directors or higher) would have authority to designate

184. Classified Information Procedures Act, 18 U.S.C. app. 3 § 1 (defining classified information as "any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security").

information as either "market sensitive" or "highly market sensitive." Once conferred, such a designation would be removed only when the information is publicly disclosed or other subsequent developments cause the information no longer to be market sensitive. Reversal of a determination that information is market sensitive (a process analogous to declassification of classified information) would require the approval of the general counsel of the agency in which the designation was originally made. Whereas classification of information for national security purposes is overseen by an office of the National Archives,[185] the process for designating information as market sensitive would be administered solely within the agency. The agency's general counsel's office could be encouraged to confer with the staff of the SEC when appropriate, but would not be required to do so.

Once information is designated as "market sensitive" or "highly market sensitive," the agency would be required to take appropriate steps to protect it both from unauthorized selective disclosure and from unauthorized use in securities trading after an authorized selective disclosure. More precautions would be taken with "highly market sensitive" information than with "market sensitive" information, but both categories of information would be given some protection. Steps at the agency level to protect the nonpublic information could include the following:

1. Permit disclosure of the information outside the government only after written documentation of the reason for the disclosure outside the government (e.g., a memo or email to an agency ethics officer explaining why the outside person needs to know). The written documentation would list the names of persons receiving the information and the steps taken to prevent further dissemination or use of the information for securities trading.
2. Provide a standard written warning to persons outside the government who receive selectively disclosed government information. The warning would state that unauthorized disclosure of the information violates government regulations and that use of the information for trading in securities markets could in some circumstances constitute securities fraud. Such a warning could be included in the bottom of any email or other communication that contains nonpublic government information (this approach—similar to that used by many law firms to protect privileged communications—is easy and inexpensive because standard warning language could be pasted into an email, letter or other document). Information recipients who further disseminate the information without authorization or who use it for securities trading would be barred from receiving selectively disclosed information in the future.

185. *See* Exec. Order No. 13,526, 75 Fed. Reg. 708–09, 720 (Dec. 9, 2009).

3. Require that government contractors and certain other categories of outsiders sign a written confidentiality agreement before being given access to nonpublic government information. This agreement would expressly prohibit use of confidential government information for securities trading or disclosure of the information to persons who will use it for securities trading. Unlike the written warning set out directly above, such an explicit nonuse agreement would likely create a relationship of trust and confidence sufficient to support an insider trading prosecution under the securities laws.[186]
4. Implement similar measures to protect information that the U.S. government learns from foreign governments to prevent it from being selectively disclosed and used for trading in U.S. or foreign markets. This aspect of an FGD regime would respond to the need for governments to share confidential economic information that is material to investors globally, and the risk that foreign governments will not trust the U.S. government with nonpublic information (for example, whether and how Argentina will make payments on its debt) if the U.S. government does not take steps to prevent use of that information in securities trading.

c. Prohibiting Selective Disclosure to Certain Categories of Outsiders

A somewhat different approach—more closely modeled on SEC Regulation FD itself—could focus on categories of outsiders that should not receive nonpublic government information because of the risk that they would use the information in securities trading or pass it along to persons who use it in securities trading.[187] Hedge funds and other institutional investors, securities analysts, political intelligence firms, investment advisers, and broker dealers are perhaps some of the more obvious candidates for such a list. These initial categories of prohibited recipients could be designated by statute, but adding to the list or creating exceptions would be done through agency rulemaking. The challenging task for the individual agencies would be to designate categories of persons and entities that might "use" or "tip" nonpublic government information for securities trading without the number of persons and entities on such a "prohibited" list being so great as to interfere with normal agency functions. This determination could be made by individual agencies separately, although the agencies might consult with the SEC in forming their

186. *See* United States v. O'Hagan, 521 U.S. 642, 652 (1997); *supra* notes 17-18 and accompanying text (discussing Rule 10b5-2(b)(1) and (2)).

187. Regulation FD, for instance, prohibits certain corporate insiders from selectively disclosing material nonpublic information to enumerated categories of outsiders including securities analysts, broker-dealers, investment advisers, and holders of the corporation's securities who are likely to trade on the basis of the information. 17 C.F.R § 243.100 (2013).

lists of prohibited recipients of nonpublic information. An agency head or general counsel could be authorized to remove the selective disclosure prohibition from a specific person or entity in appropriate circumstances. For example, the Treasury Department might have a good reason to disclose nonpublic information about its regulatory or enforcement position to one or more financial services firms. An agency that makes such an exception could be required to enter into a confidentiality and nonuse agreement with the recipient of the selectively disclosed information.

One constitutional concern with listing prohibited recipients of selective disclosure is that persons on the list will then be required to carry out their business functions as well as their role as citizens (including political activity protected by the Constitution) at a disadvantage from persons not on the list.[188] They will not be able to learn information from the government until that information has been publicly disseminated. Persons and entities not on the list, in contrast, will be able to learn nonpublic government information. Moreover, whenever persons on the list exercise their constitutional right to petition government officials for redress of their grievances, government officials will likely be very cautious about what is said to them and indeed may not agree to meet with them at all, forcing such persons to indirectly make contact that other persons can make directly. The difference in treatment between persons and entities on the list and those not on the list may support a constitutional argument that equal protection is being denied or that First Amendment rights are unconstitutionally compromised.

Another practical problem is that persons and entities on the list could use other persons and entities not on the list as conduits for acquiring nonpublic information from government agencies. Think tanks, public interest groups, academic researchers, journalists, and many other persons not ordinarily associated with securities trading could be enlisted by hedge funds, money managers, and other securities traders for this purpose. This would not only circumvent the FGD regime but also undermine important functions the conduit persons and organizations are supposed to carry out when they acquire and disseminate information about government (an academic or journalist who is moonlighting for a hedge fund is probably not as likely to produce as high quality a product in as timely a manner as one without this conflict of interest). In this way, the approach of Regulation FD of barring selective disclosure to certain categories of persons may be more suitable for public companies that interact with noninvestor constituencies on a more limited and more formal basis, than it is for government agencies that are expected to engage in frequent exchange of information with a wide range of constituencies as well as persons whose professional function is to research and explain to the public the workings of government.

188. *Cf.* Antony Page & Katy Yang, *Controlling Corporate Speech: Is Regulation Fair Disclosure Unconstitutional*?, 39 U.C. DAVIS L. REV. 1, 47–60 (2005).

d. Time and Place Restrictions

Another related—but perhaps less divisive—approach would be to designate certain categories of meetings, conference calls, and events in which nonpublic information is not to be discussed unless there is a confidentiality and nonuse agreement or the same information is disclosed publicly at the same time. Meetings with certain categories of persons or entities could trigger this requirement (this relates to the "list" concept discussed above, although instead of a flat prohibition on selective disclosure, a confidentiality/nonuse agreement would be an option). For example, meetings with institutional investors (such as mutual fund, hedge fund, or private equity firm managers) and trade associations (such as the Securities Industry Association or the International Swaps and Derivatives Association) or with securities analysts and political intelligence consultants might fall into the category of meetings that government officials only participate in if (1) it is agreed ahead of time that no nonpublic government information is to be discussed, (2) a confidentiality and nonuse agreement is entered into by all meeting participants, or (3) the meeting will be streamed live on the agency website. Such a rule could also impose stricter requirements on meetings that focus on particular categories of subject matter most likely to be material to traders in securities markets, such as the award of a government contract, the government's response to solvency issues in a financial institution, government enforcement action against a particular company, and agency rulemaking or interpretive leanings that have not yet been made public.

Discussion of nonpublic government information at certain other categories of meetings could simply be prohibited. For example, perhaps only public information should be discussed at partisan political events with agency employees in attendance. The Hatch Act already requires that executive branch officials attend such events only in their personal capacity,[189] so it is difficult to justify discussion of nonpublic government information at such events (the fact that participants are paying to attend is particularly troubling).[190] Other categories of non-government sponsored social events—particularly events that people pay to attend—could be added to the list of meetings in which nonpublic government information is not to be discussed.

e. Violations

Regardless of which restrictions are imposed on selective disclosure, or which combination of restrictions is imposed, an FGD regime will have to address what is to be done if there is a violation. Public disclosure by the agency of the same information that was selectively disclosed is one remedial measure that could be required in appropriate circumstances. This disclosure should be made (perhaps on the agency website)

189. *See* 5 U.S.C. § 7324 (2012).
190. *See* Nagy & Painter, *supra* note 21, at 1359 n.390.

as soon as possible after the agency learns of a departure from a restriction that is required under its FGD rules. If public disclosure is inconsistent with important agency objectives (a determination that should probably be made at least at the level of the agency's general counsel) the agency should take whatever other steps are possible to prevent further selective disclosure of the information as well as its use in securities trading. Agency disciplinary action against federal officials who violate the agency's policies may be warranted. A report by an agency to the SEC of a suspected violation of agency FGD rules also might be an appropriate way to put the SEC on notice about possible insider trading law violations.[191]

f. Best Practice Protocols

Finally, Congress could opt for a lighter touch that would give considerably more discretion to individual agencies rather than mandating specific rules to address selective disclosure. Congress could, for instance, instruct the executive branch agencies to develop their own "best practices" on selective disclosure of nonpublic government information. These best practices could be implemented through agency rulemaking, personnel policy, or other means. For example, there could be a "best practice" that agencies make information public as soon as practically consistent with agency objectives (talking points posted on a webpage, etc.). Some of the other measures described above might be implemented as guidelines or rules by one or more agencies as part of their best practices.

Some federal agencies are already responding to public criticism with their own "best practices" for public disclosure of information. For example, in late 2011 the Federal Reserve Board (the "Fed") faced criticism in the *Wall Street Journal* for its private discussions of policy decisions with economic analysts retained by wealthy individual and institutional investors.[192] In early 2012 the Fed announced a new policy for public disclosure of federal funds rate forecasts by its policy committee members.[193] Although the Fed has policy reasons to publicly disclose such internal deliberations besides avoiding misuse of confidential information,[194] the new disclosure policy reduces that risk as well. The dis-

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191. *See infra* notes 209–10 and accompanying text (discussing circumstances under which a reported FGD violation may warrant an SEC investigation).

192. Susan Pulliam, *Investors Bullish on Fed Tips*, WALL ST. J., Nov. 23, 2011, http://online.wsj.com/news/articles/SB10001424052970204554204577025922155198762.

193. *See* Jon Hilsenrath & Luca Di Leo, *Fed Will Detail Rate Plans, Easing Market Guesswork*, WALL ST. J., Jan. 4, 2012, http://online.wsj.com/news/articles/SB100014240529702034623045777138850741089974 ("Under the plan, the Fed will publish a range of forecasts for interest rates among the central bank's 17 individual policy makers—including five board governors and 12 regional Fed bank presidents.").

194. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., STATEMENT ON LONGER-RUN GOALS AND MONETARY POLICY STRATEGY (2014), http://www.federalreserve.gov/monetarypolicy/files/FOMC_LongerRunGoals.pdf ("The Committee seeks to explain its monetary policy decisions to the public as clearly as possible. Such clarity facilitates well-informed decisionmaking by households and

closure policy—embodied in the minutes of the Fed's December 2011 policy meeting rather than in a regulation—is the type of "best practice" that could be implemented by other agencies seeking to enhance transparency and avoid misuse of selectively disclosed information. Another example of a "best practice" is the Federal Reserve Bank of New York's decision to post on its website the surveys it sends to major financial firms ahead of monetary policy meetings.[195] Because those surveys contain queries that "can provide early clues to the Fed's thinking," same-day website accessibility creates a more level playing field for ordinary investors who previously lacked access to these surveys.[196]

Prior to the SEC's adoption of Regulation FD in 2000, a similar "best practices" approach was suggested as a preferable alternative for the private sector.[197] The SEC rejected this approach because it believed that an outright prohibition of selective disclosure was necessary for publicly traded companies.[198] There may, however, be more to favor this approach in the context of government disclosure because, as public servants, federal officials are already obliged to factor the public interest into their decision-making. Best practices could stand alone or perhaps be combined with a few specific statutory rules such as a prohibition on discussing nonpublic government information at political fundraisers.

2. *The Legislative Branch*

Many of these approaches to selective disclosure of nonpublic market-moving information in the executive branch could be used to address the leaking of political intelligence in the legislative branch. There are, however, important differences.

First, there are 435 Representatives (plus six nonvoting members) and one hundred Senators in the legislative branch, compared with only two elected officials, the President and Vice President, in the executive branch. Representatives and Senators are expected to meet with constituents frequently and are often asked their views on important legislation, including indications of how they will vote. Imposing a "need to know" requirement in this context could be unduly burdensome. And

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businesses, reduces economic and financial uncertainty, increases the effectiveness of monetary policy, and enhances transparency and accountability, which are essential in a democratic society.").

195. Susan Pulliam, *NY Fed Opens up Its Discussions with Banks*, WALL ST. J., Dec. 3, 2011, http://online.wsj.com/news/articles/SB10001424052970204397704577074703634129484.

196. *Id.*

197. *See* Selective Disclosure and Insider Trading, Exchange Act Release No. 7,881, Fed. Sec. L. Rep. (CCH) ¶ 86,319 (Aug. 15, 2000) (pointing out that some commenters recommended "that the Commission not adopt any mandatory rule prohibiting selective disclosure, like Regulation FD, but instead pursue voluntary means of addressing the problem, such as . . . the promotion of a 'blue ribbon' panel to develop best practices for issuer disclosure").

198. *See id.* ("Regulation FD is also designed to address another threat to the integrity of our markets: the potential for corporate management to treat material information as a commodity to be used to gain or maintain favor with particular analysts or investors. As noted in the Proposing Release, in the absence of a prohibition on selective disclosure, analysts may feel pressured to report favorably about a company or otherwise slant their analysis in order to have continued access to selectively disclosed information.").

written confidentiality and nonuse agreements could further impede constituent communication. Cordoning off broad categories of persons or entities from communication with their elected representatives would also be politically and perhaps constitutionally unacceptable (Senators and Representatives from New York, Massachusetts, and Connecticut, for example, frequently communicate with persons affiliated with hedge fund, private equity, and mutual fund firms).[199]

For the legislative branch, perhaps even more than the executive branch, the starting point should be public disclosure of as much information as possible. House and Senate rules should probably encourage—but not require—members to disclose on their websites their views on pending legislation. The websites could always include a caveat that the member's views may change as they continue to discuss the legislation with their constituents. Members who are asked in private conversations about the views or potential votes of other members also could be encouraged to refer the inquirer to the other members' websites, although communication about impressions of the views of other members should not be prohibited. Calendars of members and their staff could also be posted on members' websites so the public can see with whom they are meeting.[200] While these disclosures would not necessarily include the substance of the meetings, the disclosure of the meetings would probably make it less likely that nonpublic information would be disclosed and then used for securities trading. These and other "full disclosure" guidelines could be articulated in the House and Senate rules as "best practices," departure from which could displease voters and lead to criticism in the press but would not result in an ethics investigation or sanction of the member.

Besides a "full disclosure" principle, House and Senate rules or best practices could preclude members and their staff from discussing any nonpublic government information at political fundraisers, and perhaps also in meetings attended by persons known to the member or staff person to be seeking nonpublic information at the meeting for purposes of securities trading. Because of the "knowledge" requirement, disciplinary action would not be likely under these rules (Indeed, the rules could be phrased as a "best practice" which would preclude disciplinary action altogether.). If, however, a member or staff person discussed nonpublic government information with someone who later used it for securities trading, the rule or best practice provision could be grounds for strong public criticism, and could become fodder for an opposing political campaign. The member might be compelled to explain publicly why he or his staff member did not know that the meeting participant was seeking information for securities trading. Such a broad standard—although diffi-

199. *See* Mullins & Pulliam, *supra* note 24.
200. *See* Nagy & Painter, *supra* note 21, at 1359 (discussing the Sunlight Foundation's "Operation Punch Clock" campaign).

cult to enforce as a rule in a formal proceeding—thus might be a sufficient deterrent in a legislative branch that is sensitive to public opinion.

Yet another approach would be for members to post on their webpage a notice explaining that the member or a member of her staff may from time to time discuss nonpublic government information with constituents who have relevant questions or concerns. The message would go on to say that

> in such circumstances, I or a member of my staff will share nonpublic information with a constituent so the constituent might better participate in the deliberative process. The constituent in turn is expected not to use the nonpublic information for purposes of securities trading and not to disclose the information to someone else who will use it in securities trading.

If a member or staff member communicates nonpublic information to a constituent in writing, for example in an email, the rule or "best practice" could provide that a similar statement should be included at the end of the written communication. This statement alone would probably not be sufficient to establish a legal relationship of trust and confidence creating liability under insider trading laws,[201] but it would probably discourage misuse of the information in many instances.

Although trading by members of Congress themselves is not the subject of this Article, members have access to much selectively disclosed nonpublic information from executive branch agencies. Public confidence is eroded—and actual insider trading law violations may occur—when members of Congress and their staff make changes in their own investment portfolios after they have received such nonpublic information.[202]

Congress could adopt any one of a number of measures to guard against the use of material nonpublic information as well as to counter the public perception that legislative judgments are sometimes influenced by their likely effect on the personal investment portfolios held by members. For starters, Congress could pass legislation, or adopt a rule or best practice, that members and their senior staff put their assets in a blind trust and/or only make changes to their portfolios at certain times of year, perhaps during Congressional recesses when they are less likely to have access to selectively disclosed information. Such "trading windows" have been used by publicly traded companies to avoid insider trading allegations against their executives, and Congress could consider

201. *See supra* notes 15–19 and accompanying text (explaining when a legal relationship of trust and confidence is formed).

202. *See* Kimberly Kindy et al., *Lawmakers Reworked Financial Portfolios After Talks with Fed, Treasury Officials*, WASH. POST, June 24, 2012, http://www.washingtonpost.com/politics/lawmakers-reworked-financial-portfolios-after-talks-with-fed-treasury-officials/2012/06/24/gJQAnQPg0V_story.html (reporting that thirty-four members of Congress made changes to their investment portfolios, mostly switching to safer investments, after private meetings with Treasury Department and Federal Reserve officials in the midst of the 2008 financial crisis).

adhering to a similar regime.[203] Another approach, recently proposed in an article by one of us, would prohibit members from holding equity or debt securities in companies substantially affected by the work of any congressional committee on which they hold membership.[204] Congress could also explore the adoption of an even stricter anticonflict measure, such as a statute or rule that would, subject to some narrow exceptions, prohibit members from owning any securities other than those in widely held investment funds that are not sector specific.[205]

3. The Judicial Branch

Selective disclosure by judicial branch officials is not the principal focus of this Article, and given the strict confidentiality norms observed by judges and their law clerks, selective disclosure is not as likely to be a problem in the judicial branch as it is in the other two branches of government. Leaks do occur, usually from law clerks, but most leaks occur after judicial decisions are publicly announced (For example, there were leaks of information in 2012 about how Chief Justice Roberts made up his mind to uphold the Patient Protection and Affordable Care Act, often referred to as "Obamacare,"[206] but there were no reported leaks before the decision was announced.). Such information about why judges decided what they already decided should not be disclosed by law clerks,[207] but it is much less likely to be used for securities trading than information about what judges are going to decide in the future.

Ex parte communications rules also severely limit communications about cases with judicial officers outside of formal hearings, reducing the opportunity for selective disclosure. Congress and administrative agencies, by contrast, regularly engage in *ex parte* communications with regulated industries and other constituents.

Nonetheless, an FGD regime could encompass an effort by the federal courts to protect nonpublic information about judicial decisions from being used in securities markets. For example, procedures for the announcement of important judicial decisions could be reviewed and refined. Although the development of new rules would best be left to the

203. *See* RALPH C. FERRARA, DONNA M. NAGY, & HERBERT THOMAS, FERRARA ON INSIDER TRADING AND THE WALL § 7.02[d] (2013) (discussing preestablished "safe" trading periods during which directors, officers, employees, and other agents of publicly traded companies are generally permitted to trade in their company's securities).

204. *See* Nagy, *supra* note 167, at 570 & n.11 (2013) (referencing President Obama's call in his 2012 State of the Union Address for new legislation that would prohibit "any elected official from owning stocks in industries they impact").

205. *Id.* at 620–23 (discussing a proposal that would have required Members of Congress to sell any stocks that create conflicts or hold such investments only in blind trusts).

206. *See* Sam Baker, *Supreme Court Healthcare Ruling Leaks Have DC Buzzing: Who is the Culprit?*, THE HILL (July 4, 2012, 10:00 AM), http://thehill.com/blogs/healthwatch/legal-challenges/236197-supreme-court-talk-has-dc-buzzing-who-is-the-leaker.

207. *See* Richard W. Painter, *Open Chambers?*, 97 MICH. L. REV. 1430, 1471 (1999) (reviewing EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT (1998) and discussing the associated breach of confidentiality rules).

Judicial Conference of the United States, Congress could consider requiring federal courts to implement new provisions in codes of ethics, or to adopt other measures, that would explicitly address the risks of selective disclosure.

B. Implementing and Enforcing an FGD Regime

A plan for implementing an FGD regime would need to respect constitutional concerns as well as the broader political economy. Thus, at this point in time, mandates could be brief and could allow considerable flexibility.

For example, focusing first on the executive branch, Congress could enact a statute to read: "Each executive branch agency shall within 180 days of enactment of this title, promulgate its own rules designed to prevent disclosure of material nonpublic government information to persons who will use such information for trading in securities markets." If Congress were to choose the "best practices" approach, or allow it as an option, the phrase "best practices" would be inserted in place of or in addition to the word "rules" in the statute. The House-Senate report or other legislative history accompanying this bill could describe specific approaches that the agencies might consider for implementing the statutory mandate, including the possible approaches described in this article. The statute could also instruct the SEC to study the effectiveness of these agency rules after they are implemented and submit a report to Congress, although such a report should not be due until the SEC has had time to examine how the agency rules work in practice.

Alternatively, in the absence of congressional action, the President could implement an FGD regime for the executive branch through an Executive Order.

Implementing an FGD regime for congressional officials and employees rests with Congress alone. Congress could, for example, make a statutory promise to enact its own rules, while reserving the flexibility it needs to design rules consistent with the obligation elected officials have to communicate freely with their constituents. The statute thus could provide, "the House and the Senate shall each within 180 days of enactment of this title, promulgate its own rules designed to prevent disclosure of material nonpublic government information to persons who are likely to use such information for trading in securities markets."

Enforcement of the FGD regime—for both the executive and legislative branches—could, at least in many instances, involve the SEC at the initial stage of an investigation. For instance, where the SEC's regular surveillance of trading in securities markets reveals the possible selective disclosure of material nonpublic government information, the SEC could begin an investigation and could notify the relevant agency or congressional committee. Indeed, the SEC's regular surveillance of market activity has uncovered selective disclosure on several instances in the past, such as in 2005, when there were noticeable spikes in trading volume and stock prices for several companies with substantial exposure to asbestos lawsuits.[208] These spikes occurred two days before a speech by Senate Majority Leader Bill Frist (R-Tenn.) that announced his support for legislation that would have created a $140 billion trust fund for asbestos liability claims.[209] The SEC could then work with the agency or congressional committee to determine whether there were any actual violations of Section 10(b) of the Exchange Act and Rule 10b-5. That is, the SEC could investigate the persons who allegedly disclosed the government information, the likely recipients of the selectively disclosed information, and the persons who may have traded on the basis of the information, and could institute enforcement actions where facts demonstrate fraudulent tipping or trading. For instance, if the SEC could show a federal official's pecuniary gain in return for the selective disclosure of nonpublic government information used for trading, the SEC would have the evidence necessary to satisfy the personal benefit test for tipper/tippee liability.[210] Moreover, in some instances, confidentiality warnings and nonuse agreements required by the FGD regime could define the relationship of trust and confidence necessary to establish that persons outside the government misappropriated the selectively disclosed information that had been entrusted to them by a federal official.[211] The SEC already is empowered to enforce existing antifraud laws, and thus the FGD regime could have some bite.

When, however, an SEC investigation fails to reveal facts indicating the receipt by a federal official of an improper personal benefit, or a misappropriation of government information, the SEC's role should cease. Violations of selective disclosure rules that fall short of illegal insider tipping and trading should not be remedied by the SEC. Instead, when an agency official has violated an FGD rule, disciplinary action should be taken by the agency employing that official. When a Member or employee has violated an FGD rule, the House or Senate ethics committees, or some other congressionally-delegated body, should be charged with disciplinary authority.

FGD violations may also be discovered separately from the SEC's market surveillance activities. For example, a supervisor may have reason to believe that a subordinate has withheld information required to be made public, or released information required to remain confidential. In

208. Nagy & Painter, s*upra* note 21, at 1301–02.

209. *See* Brody Mullins & Kara Scannell, *Hedge Funds Hire Lobbyists to Gather Tips in Washington*, WALL ST. J. (Dec. 8, 2006), http://online.wsj.com/news/articles/SB116554698892944296 (reporting that the SEC "is looking into whether laws are being broken somewhere in the transfer of information between Congress and Wall Street").

210. *See supra* notes 14, 117 (referencing criminal prosecutions involving an FBI agent tipping confidential law enforcement database information and a USDA employee tipping cotton crop statistics).

211. *See* SEC v. Davis, Litigation Release No. 18,322, 81 SEC Docket 2952 (Sept. 4, 2003) (announcing SEC settlement of securities fraud charges involving a political consultant who tipped material nonpublic T-Bill information to bond traders at Goldman Sachs notwithstanding his agreement with the Treasury Department to retain the confidentiality of the information until a press embargo was lifted).

such instances, the agency or a congressional committee may wish to investigate possible violations of the FGD regime by the agency or congressional official. Requiring a report to the SEC of a violation of agency or congressional FGD rules, however, might be a good approach, as the report would give the SEC an opportunity to begin an insider trading investigation in appropriate cases.

Because of constitutional and policy concerns, we do not propose federal legislation that would affect the operations of state or local governments, although the ideas discussed in this Article, and any federal legislation that is enacted, could provide a useful model for states and localities.

C. The Government's Sale of its Market-Moving Information

Given the market value of certain types of nonpublic government information, as well as severe budget shortfalls at the federal and state levels, it may be tempting for government agencies to explore the possibility of selling "early release" of market-moving information to investors who are willing to pay for it. Could the Department of Defense, for example, recoup a portion of the cost of a new Air Force fighter plane contract by selling to hedge funds early release of the identity of the contractor awarded the contract? Could the DOJ sell early release of the identity of companies it was going to indict? Following this approach to its logical conclusion, government agencies could cut out the "middle man" and convey information directly to a trading floor set up in the Department of the Treasury, which would then plow trading profits back into agency budgets.

While these examples may seem outrageous, the possibility of a federal or state agency selling access to its own market-moving information is hardly a mere hypothetical. The University of Michigan is a richly endowed subdivision of the financially strapped State of Michigan, and the University has generated more than a million dollars annually by selling the exclusive publication rights to its consumer confidence survey data to Thomson-Reuters.[212] Thomson-Reuters, in turn, collected steep premiums from hedge funds and other institutional investors that were willing to pay for an exclusive two second advanced feed to that information (designed specifically for algorithmic trading) ahead of other Thomson-Reuters subscribers.[213] The University must have known that Thompson-Reuters sold such advanced feed release and that the revenue generated from that selective disclosure constituted a large part of Thomson-Reuters's interest in the data. The fact that this arrangement might make national and global securities markets less fair, and perhaps

212. Brody Mullins et al., *Traders Pay for an Early Peek at Key Data*, WALL ST. J, June 12, 2013, http://online.wsj.com/news/articles/SB10001424127887324682204578515963191421602.

213. *Id.*

less attractive, to other investors, was apparently not of great concern.[214] The New York Attorney General, however, was greatly concerned and threatened to seek a court order under the Martin Act, an antifraud provision much broader in scope than Section 10(b) and Rule 10b-5 of the Exchange Act.[215] Although Thomson-Reuters took the position that its tiered release of the information was fully disclosed to all subscribers (and therefore not fraudulent), the company "capitulated and agreed to temporarily suspend the practice for the duration of the investigation."[216]

Despite the temptation for government agencies to make money in this way, there are substantial downsides. Government agencies might become less open to the public in general, hoping to sell information first to investors willing to pay. Timing of public announcements by government officials might be driven by market considerations—e.g., when information is mostly likely to move markets and maximize trading profits—rather than the public interest. Rather than make a series of less significant announcements, an agency might hold back related information until it could all be released at the same time, and have greater market impact. Furthermore, there can be an enormous incentive for government agencies (including state universities engaged in research) to exaggerate the importance or magnitude of information, in order to maximize the trading profits of those willing to pay for the early release of that information. In sum, arrangements where investors pay government agencies for market-moving information could have long-term negative impact on effectiveness and credibility of government that far outweigh any short-term gain in accounts receivable. This negative impact is in addition to the effect of selective disclosure on securities trading markets if investors move their money elsewhere because they believe the game is stacked against them unless they pay the government for preferential access to information.

V. CONCLUSION

The selective disclosure of market moving information by federal officials undermines the integrity of government by adding to the already long list of situations in which well-connected persons have advantages over ordinary citizens. Selective disclosure by government insiders, like the selective disclosure by corporate executives that preceded Regulation FD, also widens informational disparities among securities traders. Ordinary investors are likely to question their ability to make good invest-

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214. The University of Michigan has a substantial endowment, a portion of which is invested in securities markets. Using similar logic, the University might be tempted to consider early release of the information to managers of this endowment so they too could profit from it.

215. *See* Peter Lattman, *Thomson Reuters to Suspend Early Peeks at Key Index*, N.Y. TIMES, July 7, 2013, http://dealbook.nytimes.com/2013/07/07/thomson-reuters-to-suspend-early-peeks-at-key-index/.

216. *Id.*

ment decisions if well-connected investors possess the privilege of an inside government track.

In the absence of personal gain by a federal official (or other facts indicating that government information has been misappropriated) neither the selective disclosure of material nonpublic government information nor the securities trading on such information is generally illegal under the federal securities laws. But a solution lies within the government itself, and more specifically within the individual governmental units from which political intelligence originates. To foster fairer government disclosure, each branch, agency, and other component of government must act to design its own policies and procedures consistent with its other objectives and the objectives of government as a whole.